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NO.

In the
Supreme Court of the United States

OCTOBER TERM, 1983

K & B, INC.,

Petitioner,

VERSUS

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

The Court of Appeals, based upon a *de novo* independent review of the record, reversed the District Court's finding of fact that no discrimination against females existed in the K&B manager trainee program during the period 1965-1972. The question presented is whether this is contrary to and violative of Federal Rule of Civil Procedure 52(a) and is contrary to past decisions of this Court.

The Court of Appeals has established the principle for Title VII cases that "zero" carries special significance; that "zero" is something other than a number; that it is relentless and unyielding evidence of discrimination which creates an irrebuttable presumption of discrimination. The question presented is whether or not this principle create a new standard of proof in violation of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973) and its progeny.

Because the errors of the Court of Appeals are patent on the face of its Opinion, this case is appropriate for the exercise of this Court's power to vacate and remand with directions. See, *International Ass'n of Mach. & Aerospace Wkrs. v. Terrell*, 456 U.S. 955, 102 S.Ct. 2028, 72 L.Ed.2d 479 (1982).

PARTIES TO THE PROCEEDING

In addition to the parties appearing in the caption to this petition, Andra A. Capaci was a party to this action in the courts below.

Pursuant to Rule 28.1 of the Rules of this Court, undersigned counsel certifies to the Court that, after diligent investigation, he is advised that K&B, Inc. has no parent companies, subsidiaries or affiliates as those terms are used in said rule.

DANIEL LUND

JAMES B. IRWIN

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MAY IT PLEASE THE COURT:

K&B, Inc. petitions for a Writ of Certiorari to review the opinion of the United States Court of Appeals for the Fifth Circuit entered on August 8, 1983 (Appendix A), and Judgment entered on August 9, 1983 (Appendix C).

OPINIONS BELOW

The opinion of the Fifth Circuit Court of Appeals (Appendix A, *infra*) is reported at 711 F.2d 647 (5th Cir. 1983). The opinion of the district court (Appendix B, *infra*) is reported at 525 F.Supp. 317 (E.D.La. 1981).

JURISDICTION

The judgment of the Court of Appeals was entered on August 9, 1983 (Appendix C, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Section 2000e-2 of the Civil Rights Act of 1964 (42 U.S.C. §2000e *et seq.*) provides in pertinent part:

> "(a) It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin;"

Federal Rules of Civil Procedure, Rule 52(a) (28 U.S.C.) provides in pertinent part:

> "In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses."

STATEMENT OF THE CASE

The facts of this case are stated in the District Court opinion (Appendix A at A-39-56 and A-70-84). K&B, Inc., was a relatively small drugstore chain with an established and stable management structure from its establishment in 1905 until 1971 when it embarked on a rapid expansion program. This expansion required the hiring of additional management personnel including manager trainees. There were two routes to this position: (1) promotion from within the ranks of the organization's employees, and (2) by reason of an entry level hiring decision.

This sex discrimination case commenced on October 8, 1974, when Andra A. Capaci, then a pharmacist with K&B, alleged that her employer discriminated in its employment practices on the basis of gender in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.*. The Equal Employment Opportunity Commission (EEOC) was allowed to intervene on July 19, 1977, alleging that K&B had failed to promote and hire females into its management positions on the same basis as males.

There has been continuous participation by females in K&B's storewide management positions since long before the passage of Title VII.[1] K&B has, at least since 1968, affirmatively solicited females to enter its manager trainee program. However, between 1965 and 1972, although there were females solicited for the manager trainee program, and although females actually occupied various storewide

[1] K&B, Inc. Exhibit 110, photocopied and appended hereto as Exhibit 1 at A-114, reveals the progressions of females in management through the time of trial.

management positions, zero females entered the manager trainee program whereas 267 males did. This zero statistic was duly considered by the district judge on the record as a whole, which included fact witness and expert witness testimony. The district judge was satisfied from this record that the EEOC, aided by the zero statistic and any inference of discrimination it may have raised, "ha[d] not proved by a preponderance of the evidence its claim that K&B had a policy of excluding females from management positions." (Appendix B at A-87).

The District Court ruled in favor of K&B on all issues with the exception of one minor aspect of Capaci's individual disparate treatment claim not relevant here. The decision followed a long period of extensive discovery and motion practice, which culminated in a thirty-four day trial during January-April, 1979, with a thirty-fifth day of trial in April, 1980.[2] After extensive briefing by all parties and with the benefit of a transcribed record, the District Court issued its decision on October 15, 1981, dismissing, in addition to Capaci's claim discussed *supra*, the EEOC's class claim that K&B had a policy of excluding females from management positions. The District Judge wrote:

> The EEOC has presented a less than impressive statistical case ... The nonstatistical evidence of the EEOC adds little weight to its statistical case. The nonstatistical evidence produced by K&B shows that for many years before the passage of the Civil Rights Act, K&B had no policy or practice of exclusion of females from management positions. The males and females got to management by different routes, however,

[2] The bench trial was limited to liability issues.

male pharmacists became managers; female salespersons became managers.

Shortly after the Civil Rights Act became effective, the expansion programs of K&B produced changes in the management promotion procedure for both males and females ... The route to these positions was through a manager trainee program for nonpharmacists ...

The practice of promoting female salespersons directly to assistant manager ceased at about the time the Civil Rights Act became effective, and females were slow to enter the manager trainee program. As a result no female was promoted to a storewide management position for almost nine years. ...

The inferences sought by the illegal advertising allegations and the record keeping violation allegations cannot be made to bolster the case of the EEOC. (Appendix B at A-87-88)

Both Capaci and the EEOC appealed the District Court decision. After full argument, the Court of Appeals issued its Opinion on August 8, 1983, affirming in part, reversing in part, and remanding in part for further proceedings. The Court of Appeals reversed the District Court and found gender based discrimination in K&B's hiring of manager trainees during the period 1965-1972. The Court seized upon the zero statistic, "inexorable zero," (Appendix A at A-29), and ruled that it created an "insurmountable challenge" (Appendix A at A-25) to defendant to rebut. K&B filed a Petition for Rehearing and a Suggestion of Rehearing En Banc on August 22, 1983, limited to the single issue on which the reversal and remand was based. Capaci also filed a Petition for Rehearing on September 1,

1983. The Court of Appeals denied the Petitions for Rehearing and the Suggestion of Rehearing En Banc on October 3, 1983.

SUMMARY OF ARGUMENT

A female pharmacist filed a sex discrimination suit against petitioner, a chain drugstore. The EEOC intervened alleging exclusion of females from management. The District Court, as affirmed by the Fifth Circuit, dismissed all but a minor claim of the plaintiff. The trial court dismissed all aspects of the EEOC claim, but the Court of Appeals partially reversed, finding that discrimination occurred in the limited time period from 1965 to 1972 in one management position, manager trainee. The Fifth Circuit decision (1) violates the clearly erroneous rule of F.R.C.P. 52(a) and (2) improperly applied an irrebuttable presumption of discrimination.

The scope of appellate review is limited by the Rule 52(a) "clearly erroneous" standard. This Court in *Pullman-Standard v. Swint*, 456 U.S. 273, 102 S.Ct. 1781, 72 L.Ed.2d 66 (1982) overruled the Fifth Circuit's ultimate fact/subsidiary fact dichotomy which the Fifth Circuit had previously relied upon to decide Title VII cases without being tethered to the "clearly erroneous" rule. Nevertheless, in the instant case, the Fifth Circuit has gone back to its old ways. While paying lip service to the *Swint* admonition, it proceeded to weigh and balance the evidence, minimized the witnesses and testimony found convincing by the trial court, and reversed and rendered an ultimate determination of discrimination, just like it did before.

In the process, the Fifth Circuit held that since "zero" females entered the manager trainee program from

1965 until 1972, an irrebuttable presumption of discrimination arose which was "insurmountable." The "inexorable zero" could not be overcome by the fact that the company made offers to female manager trainee applicants which were rejected or by the fact that throughout, before, and after this period of time, females occupied positions of store management.

The Fifth Circuit deference to the zero statistic and its elevation of the "inexorable zero" creates a new but improper standard of proof for Title VII plaintiffs. It has doomed an employer to defeat as soon as the zero goes into evidence. No explanation will do. With this unique standard, the Fifth Circuit has erred and has departed from the guidelines of *McDonnell Douglas* and its progency.

REASONS FOR GRANTING THE WRIT

THE COURT OF APPEALS' REVERSAL OF THE DISTRICT COURT VIOLATES FED. R. CIV. P. 52(a) AND IS CONTRARY TO DECISIONS OF THIS COURT.

The Court of Appeals did not reverse the District Court for an erroneous view of the law. The reversal of the trial court was entirely on the facts. In so doing, as the Court's own comments indicate, it exceeded the narrow scope of review in cases of this type. That scope of review is limited by Fed. R. Civ. P. Rule 52(a), the "clearly erroneous" rule of appellate review. *Pullman-Standard v. Swint*, 456 U.S. 273, 102 S.Ct. 1781, 72 L.Ed.2d 66 (1982); *Inwood Laboratories v. Ives Laboratories*, 456 U.S. 844, 102 S.Ct. 2182, 72 L.Ed.2d 606 (1982). A "clearly erroneous" fact finding is one which is not supported by

sufficient evidence, *Matter of Crist*, 632 F.2d 1226 (5th Cir. 1980), so that it can be said to be without substantial evidence to support it. *Merchants National Bank v. Dredge Gen. G. L. Gillespie*, 663 F.2d 1338 (5th Cir. 1981). "In the absence of clear error, the evidence must be viewed in the light most favorable to the party who prevailed below." *Dillon v. M.S. Oriental Inventor*, 426 F.2d 977, 978 (5th Cir. 1970).

Findings of discrimination and the assessment of the relative probative force of the parties' statistical evidence are "undoubtedly factual." *Trout v. Lehman*, 702 F.2d 1094, 1101 (D.C. Cir. 1983). This Court held in *United States v. Yellow Cab Co.*, 338 U.S. 338, 342, 70 S.Ct. 177, 179, 94 L.Ed. 150 (1949), "where the evidence would support a conclusion either way but where the trial court has decided [the evidence] to weigh more heavily for the defendants, [s]uch a choice between two permissible views of the weight of the evidence is not clearly erroneous. And, this Court wrote, "In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues *de novo*." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123, 89 S.Ct. 1562, 1576, 23 L.Ed.2d 129 (1969).

Although the Court of Appeals rendered lip service to the mandate of Rule 52, a reading of the Court's analysis of the evidence relevant to the issue of discrimination reveals numerous statements evidencing that the Court improperly substituted its own construction of the record for that of the trial court without finding that the trial court was clearly in error. Examples are (1) the Court's differing view of the weight to be attached to advertising evidence (Appendix A at A-22); (2) its differing view of the probative

weight and value of expert testimony (*id.* at A-15) and of the fact witness testimony (*Id.* at A-16, 17, 20); (3) its isolating of the data presented in K&B Exhibit No. 110 to the period July 1965-1972 (*Id.* at A-114) rather than viewing it for the entire period covered, 1947-1979; (4) its preoccupation with the zero statistic to which repeated reference was made (*Id.* at A-4, A-5, A-8, A-26, A-28 and A-29); and (5) its dismissal of the trial court's findings as to the existing legitimate reasons for the observed result and its undue emphasis on the zero statistic, to wit: "...zero may be just another integer, but to us it carries special significance in discerning firm policies and attitudes." (*Id.* at A-28).

Findings of the type here involved are purely factual. *Pullman-Standard v. Swint, supra; Trout v. Lehman, supra.* In *Swint*, on writ from the Fifth Circuit Court of Appeals, this Court admonished that in Title VII cases the standard of review is a narrow one under Federal R. Civ. P. 52(a), the "clearly erroneous" rule. In *Swint v. Pullman-Standard*, 624 F.2d 525 (5th Cir. 1980), *rev'd.*, 456 U.S. 273, 102 S.Ct. 1781, 72 L.Ed.2d 66 (1982), the Court of Appeals was presented with a statistical case in which "zero" was a factor in the evidence and in the Court's reversal reasoning. In a manner which appears to be indistinguishable from the instant case, the Court conducted its own review of the record and reversed a lower court finding of no discrimination, emphasizing that the evidence contrary to the inference of discrimination drawn from the zero statistic simply was not sufficient to rebut the plaintiff's case.

This Court reversed, *Pullman-Standard v. Swint, supra*, finding that questions of discriminatory intent *vel non* were purely factual, regardless of their primary or subsidiary nature, and subject to the clearly erroneous rule. As here pertinent, Justice White wrote for this Court:

> The rule does not apply to conclusions of law. The Court of Appeals, therefore, was quite right in saying that if a District Court's findings rest on an erroneous view of the law, they may be set aside on that basis. But here the District Court was not faulted for misunderstanding or applying an erroneous definition of intentional discrimination. It was reversed for arriving at what the Court of Appeals thought was an erroneous finding as to whether the differential impact of the seniority system reflected an intent to discriminate on account of race. That question, as we see it, is a pure question of fact, subject to Rule 52's clearly erroneous standard. It is not a question of law and not a mixed question of law and fact. *Id.* (102 S.Ct. at 1789)

Rejecting the contention that the clearly erroneous rule had in fact been applied by the Court of Appeals, this Court ruled,

> First, although the Court of Appeals acknowledged and correctly stated the controlling standard of Rule 52, the acknowledgement came late in the court's opinion. The court had not expressly referred to or applied Rule 52 in the course of disagreeing with the District Court's resolution of the factual issues deemed relevant ... Furthermore, the paragraph in which the court finally concludes the USW seniority system is unprotected by §703(h) strongly suggests that the outcome was the product of the court's independent consideration of the totality of the circumstances it found in the record. (*Id.* at 1791)[3]

[3] This Court's reimposition of the clearly erroneous standard in 5th Circuit civil rights cases was outcome determinative in *Robbins v. White-Wilson Medical Clinic, Inc.*, 682 F.2d 503 (5th Cir. 1982), earlier opinion, 660 F.2d 1064 (5th Cir. 1982). *See also, Terrell v. United States*

The Court of Appeals in the instant case, as in *Swint, supra*, invoked the "clearly erroneous" rule of appellate review. In *Swint*, it was found that the rule was not, however, properly applied because of the Fifth Circuit's ultimate fact/subsidiary fact dichotomy applied in Title VII cases. In the face of the argument that Rule 52 had been properly applied, this Court examined the appellate opinion in order to define that which is an improper independent examination of the record.

Here, such examination of the appellate Opinion can lead only to one conclusion. A fact finding of nondiscrimination in manager trainee hiring which is not clearly erroneous has been reversed solely because of the Court of Appeals' independent conclusion regarding the significance of the zero statistic.

Petitioner acknowledges that the Court of Appeals invoked the narrow scope of review mandated by the "clearly erroneous" rule and that the Court of Appeals was convinced that a mistake had been made. But, the path to that determination reveals that the Court of Appeals reversed findings of fact that were not clearly erroneous only because it chose to view the evidence in a different light from that in which the trial court viewed it and without focusing on the evidentiary bases which constituted "sufficient evidence," *Robbins v. White-Wilson Medical Clinic, Inc., supra* at 503, for the District Court's findings. (See *Swint, supra*, at footnote 21).

(Footnote 3 continued)
Pipe & Foundry Co., 696 F.2d 1132 (5th Cir. 1983) (Grooms, J., dissenting) (remanded to trial court on issue of discriminatory intent after Fifth Circuit's decision vacated by this Court).

Although the Court of Appeals noted in its Opinion (Appendix A at A-26), that "The scope of review in this case is a narrow one," the preceding 23 pages were written as an independent review of the facts from the Court's *own* starting point, the zero statistic. Examples supporting this contention follow.

The District Court considered the same "zero" (Appendix B at A-44) but ultimately found, after weighting all the evidence, that the testimony of petitioner's well versed expert, an applied statistician and industrial psychologist, supported by fact witness testimony and actual employment experiences, overcame any inference of discrimination urged by the EEOC. The Court of Appeals simply superimposed on the record its own view of "zero," to wit: "...to us it carries special significance" (Appendix A at A-28), expressly finding that the District Court's analysis was impermissible on this record.

The District Court extensively reviewed the advertising evidence which was vast, and found it "less than persuasive as reflecting a policy of excluding females from the manager trainee program." (App. B at A-83) The Court of Appeals looked at the same evidence, and while finding it "not determinative" (apparently in agreement with the sense of the ruling below), cited the evidence as one of three principal reasons for reversal. (App. A at A-28) This cannot be construed as other than a substitution of the Court of Appeals' evaluation of the significance of the advertising evidence for that of the District Court.

The District Court, after hearing expert testimony and numerous fact witnesses, concluded that the self-selection factor as affecting female interest in the manager trainee program in its earlier years had a reasonable basis

in fact. (App. B at A-55) The Court of Appeals found "some merit" to the argument (thus indicating sufficient evidence to support it), but unlike the District Court, could not accept it "as an explanation" for the zero statistic. (App. A at A-8) The Court of Appeals did not find that the lower court was clearly erroneous in its consideration of this factor; it merely attributed less weight to the self-selection testimony. Rule 52 appellate review does not include weighing the evidence.

Contrary to the District Court's evaluation of the credibility and significance of witness testimony and inferences to be drawn therefrom, the Court of Appeals wrote, "There is no reason to believe that the female witnesses called were representative of all women in the labor market or employed by the defendant." (*Id.* at A-8) Many of these witnesses were called and accepted as representative of petitioner's female pool of potential hires for the manager trainee position. The Court of Appeals did not find that their acceptance as such was clearly erroneous.

The Court of Appeals decided to view the statistics regarding entries of all females into management as reflected on K&B Exh. No. 110 (Exhibit 1 appended herein at A-114) in isolation between July, 1965 and 1973, but this exhibit was intended to be viewed and was viewed at the trial level in its totality from 1947 through 1979. Furthermore, the Court of Appeals in venturing independently into the record has mistaken it by ignoring two Chief Pharmacist (CRX) promotions between 1965 and 1973 (Miller and Luizza, See K&B Exh. 110, *Id.*) and by concluding that promotions in March and May, 1965 (after passage of the Act but before the effective date of 42 U.S.C. §2000e-2), also should be ignored (Callihan and Reese—See K&B Exh.

110, *Id.*) The District Court justifiably did not see it this way.

Unlike the District Court, the Court of Appeals decided that the testimonies of Genevieve Ronquette, Lillian Hennessey, Blanche Callihan and Inez Nungesser, who represented combined experience with K&B of over 120 years, were "unhelpful on the issue of discrimination against manager trainees[4] in the 1965-72 period." (App. A at A-17) Each of these females was in management not only prior to the effective date of the Act, but for all or most of the time period the Court of Appeals chose to study. (K&B Exh. 110 at A-115) The district judge below found this testimony extremely helpful given their long histories with K&B. The Court of Appeals did not find the lower court's reliance on this testimony to be clearly erroneous.

The Court of Appeals examined the testimony of "male executives" as did the District Court. But the Court of Appeals, unlike the District Court, concluded that such testimony, "...if carefully examined, does not support a finding of nondiscriminatory treatment in the 1965-1972 period." (App. A at A-18) This testimony consumed several trial days, covered most of the history of K&B, including the involved period, and was very important to the entire case. All the Court of Appeals did was assess it differently on a cold record.

There are multiple problems in the Court of Appeals' approach. First, there is no logic to it. K&B clearly has not discriminated against females in its entire history. The

[4] This reference evidently is a mistake. There is no allegation of discrimination against manager trainees.

Court of Appeals agrees that even in 1965-1972 all other positions under attack and all promotions were free of discrimination. It is not realistic to conclude that a company which has demonstrated the utilization of qualified females in management positions for over 30 years would at particular points in time reject qualified females, or would discriminate in one job category but not in another, or would hire a proportion of female pharmacists greater than that which exists in the State as a whole and promote them accordingly to management, but would not be willing to do so in the lowest management position during times when there was a severe shortage of qualified applicants.

Second, and more fundamentally, the Court of Appeals' approach evidences a casual disregard of the district court's fact findings, according them no deference much less a presumption of validity. This is a clear and self-evident departure from the clearly erroneous standard and is contrary to the *Pullman-Standard* and *Inwood Laboratories* mandates.

In *Inwood Laboratories v. Ives Laboratories, supra*, this Court reiterated and reemphasized its position on Fed. R. Civ. P. Rule 52(a). Justice O'Connor wrote that the Rule

> ...recognizes and rests upon the unique opportunity afforded the trial court judge to evaluate the credibility of witnesses and to weigh the evidence. ... Because of the deference due the trial judge, unless an appellate court is left with the 'definite and firm conviction that a mistake has been committed', ... it must accept the trial court's findings. 102 S.Ct. at 2189. [Citations omitted]

and ruled in that case (as modified to fit the instant case):

> By rejecting the District Court's findings simply because it would have given more weight to [the zero statistic] than did the trial court, the Court of Appeals clearly erred. Determining the weight and credibility of the evidence is the special province of the trier of fact. Because the trial court's findings concerning the significance of the [statistical evidence] were not clearly erroneous, they should not have been disturbed. [Brackets inserted]
>
> * * * * *
>
> An appellate court cannot substitute its interpretation of the evidence for that of the trial court simply because the reviewing court might give the facts another construction, resolve the ambiguities differently, and find a more sinister cast to actions which the District Court apparently deemed innocent. *Id.* at 2189-2190.

The record made below did contain sufficient evidence to support the District Court's finding that discrimination against females in the manager trainee hiring was not proved and the finding of the nondiscriminatory reason for the zero statistic. The following are uncontroverted portions of the record which relate specifically to the 1965-1972 period:

1) The testimony of Besthoff and Feltman which convinced the District Court that the company did not discriminate but rather sought qualified females for the manager trainee position.

2) The testimony given by Hennessey, Nungesser, Ronquette and Callihan, each of whom was a female in management during the involved period and each of whom was convincing in her statements that discrimination was

no part of the K&B organization.

3) By 1965, K&B had already promoted seven females to management in a relatively small and stable management structure. Between 1965 and 1972, there were twelve females in management and others were solicited.

The Court of Appeal's statement that "Evidence of two or three acts of hiring women as manager trainees during this period ... would indicate at least some willingness to consider women as equals in firm management" (App. A at A-28, 29) is incomprehensible on the basis of this record. The Court grasped a single statistic for a single job and limited time period and, placing undue emphasis on it while sidelining the District Court's findings, came up with a conclusion that cannot be squared with a realistic appraisal of petitioner's employment practices over its entire history.[5] In doing so the Court clearly exceeded the limited scope of review in cases of this type.

THE FIFTH CIRCUIT HAS ESTABLISHED THE PRINCIPLE FOR TITLE VII CASES THAT "ZERO" CARRIES SPECIAL SIGNIFICANCE; THAT "ZERO" IS SOMETHING OTHER THAN A STATISTIC; THAT IT IS RELENTLESS AND UNYIELDING EVIDENCE OF DISCRIMINATION WHICH CREATES AN IRREBUTTABLE PRESUMPTION OF DISCRIMINATION. THIS PRINCIPAL CREATES A NEW STANDARD OF PROOF IN VIOLATION OF *McDONNELL DOUGLAS CORP. V. GREEN*, AND ITS PROGENY

[5] The Court of Appeals discussed Besthoff's and Feltman's testimony about efforts to solicit qualified females beginning in the early 1970's (See discussion, App. A at A-18, 19) but it is not clear what

As its Opinion reveals, the Fifth Circuit was completely preoccupied with "zero" and made repeated references to it. Five paragraphs of the Opinion make explicit reference to it (Appendix A at A-5, A-8, A-26, A-28 and A-29). This preoccupation with "zero" culminated in the finding that "the inexorable zero" (Appendix A at A-29) created not only "a great" but an "*insurmountable* challenge" to defendant to explain (Appendix A at A-25) (emphasis added).

It is the petitioner's position that the Fifth Circuit has misconstrued the significance of "zero" which is but a crude statistic. In so doing, it has elevated this raw number to a position of special significance thereby creating a principle of proof which violates the prior holdings of this Court. In substance, the Fifth Circuit, by giving special significance to "zero", has stated that "zero" creates not only a *prima facie* case, but an irrebuttable presumption of discrimination incapable of being overcome by a defendant in a Title VII suit. The road to this result is best illustrated by reviewing the history of "inexorable zero" from its genesis in Fifth Circuit jurisprudence.

The term "inexorable zero", first appeared in *United States v. T.I.M.E.-D.C.*, 517 F.2d 299, 315 (5th Cir. 1975). In *T.I.M.E.*, an employment discrimination action brought by the United States, the district court found on the basis

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(Footnote 5 continued)
importance the Court attached to this. If these efforts at affirmative action were construed as suggestive of discrimination prior to that time, nothing could be more wrong because the Act (42 U.S.C. §2000e-2), while making it unlawful to discriminate, does not impose the obligation of affirmative action. Such affirmative action steps taken by K&B and described by its witnesses were voluntary. They demonstrate an attitude wholly inconsistent with the Court's independent finding.

of the record as a whole that the defendant had discriminated against minorities. As revealed at page 693 of the district court opinion (*U.S. v. T.I.M.E.-D.C., Inc.*, 6 FEP Cases 690 (N.D. Tex. 1972), its finding was reached after reviewing not only the relevant statistics but also the testimony of the witnesses. The statistical evidence included "zero" as a statistic, but "zero" carried no special significance to the district judge who made no reference to it in his opinion. The district judge was affirmed by the Fifth Circuit, *United States v. T.I.M.E.-D.C., supra*, who, in rejecting the arguments of the defendant/appellant that the statistics required further refinement to be meaningful, noted that further refinement would not be particularly helpful because the defendants inability to rebut the statistics "...came from the inexorable zero" (*Id.* at 315). This is the first appearance of "inexorable zero" in Title VII jurisprudence.

This Court affirmed the district court and the Fifth Circuit in their respective rejections of the defendant's attacks on the statistics. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977). In footnote 23 of this Court's opinion, Mr. Justice Stewart wrote:

> "In any event, fine tuning of the statistics could not have obscured the glaring absence of minority line drivers. As the Court of Appeals remarked, the Company's inability to rebut the inference of discrimination came not from a misuse of statistics but from 'the inexorable zero' " (431 U.S. at 341, n. 23).

As this Court noted in rejecting the arguments asserted by the company against the use of statistics in Title VII cases,

both the district court and the Court of Appeals "found upon substantial evidence that the company had engaged in a course of discrimination that continued well after the effective date of Title VII." (*Id.* at 341). From the district court to the Supreme Court there was never any judicial disagreement that the record as a whole supported such finding.

Despite the repeated references to "inexorable zero" in subsequent Fifth Circuit jurisprudence, this Court's footnote reference to "inexorable zero" is the only such reference found in Supreme Court decisions. It is submitted that this Court did not intend by its footnote reference to attach any special significance to "zero" or to suggest that its presence in a case creates an irrebuttable presumption of discrimination.

Following *T.I.M.E.-D.C., Inc.*, the Fifth Circuit decided *Wilkins v. University of Houston*, 654 F.2d 388 (5th Cir. 1981). Here the Court indicated that it was attaching special significance to "zero". Although not an "inexorable zero" case, the court noted in its concluding statements that sound statistical analysis, being both complex and arduous, presents a difficult task to judges who are laymen in the statistical arena. "Our innate capacity in such matters extends to 'the inexorable zero' and perhaps, unevenly, somewhat beyond;...." (*Id.* at 410). Thus, the Fifth Circuit on the one hand stated that statistics and their analysis must be presented in an orderly fashion by experts, but that where "zero" is concerned judges, as laymen, have the "innate capacity" to attach special significance to this integer.

This special significance became more apparent in *Pegues v. Mississippi State Employment Service*, 699 F.2d

760 (5th Cir. 1983), *reversing* 488 F.Supp. 239 (N.D. Miss. 1980). *Pegues* was a race discrimination case involving employment referrals. The district judge noted that, "[w]hen the evidence is considered *as a whole,* the court has concluded that plaintiffs..." had not proved their case by a preponderance of the evidence. (*Id.* at 256-7) (emphasis added). The Fifth Circuit also purported to review the entire record in reversing the district court's findings but made a special point of noting that "the statistical disparities ... approach the 'inexorable zero' decried by the Supreme Court in *International Brotherhood of Teamsters....*" (*Id.* at n. 9).

Carroll v. Sears, Roebuck & Co., 514 F.Supp. 788 (W.D. La. 1981) was a Title VII class action in which allegations of race discrimination in employment practices were made "across-the-board". The district judge held, after a detailed review of all the statistical and testimonial evidence, that plaintiffs had failed to prove their claims. Insofar as the promotion claims were concerned, the Fifth Circuit reversed noting that among the category of "other managers" only 2 of 49 were black in 1974, "...and there were no blacks of 28 in 1977." *Carroll v. Sears, Roebuck & Co.,* 708 F.2d 183, 193 (5th Cir. 1983). Of this "zero" the court wrote,

> "These comparisons, and *especially the 'inexorable zero'* found in the salaried employee category, show a gross disparity in the treatment of blacks in promotion to top managerial positions" (*Id.*)

Carroll was decided on June 30, 1983. On August 8, 1983, the Fifth Circuit decided the instant case, *Capaci v. Katz & Besthoff, Inc.,* 711 F.2d 647 (5th Cir. 1983). In this

case, the "inexorable zero" has completed its journey through Fifth Circuit jurisprudence. "Zero" is no longer a number; it is now a highly significant piece of evidence which, standing alone, creates an irrebuttable presumption of discrimination in conflict with the applicable decisions of this court. Any fair reading of the Fifth Circuit's opinion reveals this, particularly the following quoted excerpts:

> "We differ with the defendant's suggestion that 'zero is just a number.' To the noble theoretician predicting the collisions of weightless elephants on frictionless roller skates, zero may be just another integer, but to us it carries special significance in discerning firm policies and attitudes .... perhaps for this reason the courts have been particularly dubious of attempts by employers to explain away 'the inexorable zero' when the hiring columns are totalled." [Citing *Teamsters* and *Wilkins*] (Appendix A at A-28, 29)
>
> * * * *
>
> "On the other hand, if there were no adverse effects on women [from K&B's advertising practices], then Dr. Gastwirth's statistical case is strengthened, and the defendant faces a great, and in our view *insurmountable*, challenge to explain why all 265 manager trainees hired from the external labor force in the 1965-1972 period were men." (Appendix A at A-25) (emphasis added; footnote omitted)

"Zero" standing alone is a crude statistic and nothing more. Both experts who testified in this case agreed with this statement. Clearly, statistics, including the statistic "zero", may be relied upon to create a *prima facie* case, *Hazelwood School District v. United States*, 433 U.S. 299, 97 S.Ct. 2736, 52 L.Ed.2d 768 (1977). However

this Court has written that all references to statistical evidence should be tempered by the other evidence which "brings the cold numbers convincingly to light." *International Brotherhood of Teamsters v. United States, supra,* (97 S.Ct. at p. 1856). More fundamentally, it has become a hornbook principle in Title VII cases that where statistical evidence is relied upon to support a *prima facie* case of discrimination, the defendant has the opportunity to rebut the inference of discrimination. The District of Columbia Court of Appeals recently reiterated the rule succinctly.

> If the plaintiffs have used statistics to make out a *prima facie* case, the defendants may rebut the inference of discrimination by presenting a legitimate, nondiscriminatory explanation for the observed statistical disparity or by raising a genuine issue of material fact concerning the accuracy of the picture painted by the plaintiffs' statistics. See *International Brotherhood of Teamsters v. United States,* 431 U.S. at 360, 97 S.Ct. at 1867; *Croker v. Goeing Co. (Vertal Division),* 662 F.2d 975, 991 (3rd Cir. 1981) (en banc)." *Trout v. Lehman,* 702 F.2d 1094, 1101 (D.C. Cir. 1983).

According to this Court's decisions in *McDonnell Douglas Corp. v. Green, supra,* and *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981), the ultimate burden of persuasion always rests with the plaintiff. The framework for evaluating the evidence in determining whether or not this burden has been carried is this: (1) the plaintiff puts on a *prima facie* case; (2) the defendant rebuts same and if the rebuttal is successful in the sense that the defendant has articulated a nondiscriminatory reason for the observed results, the plaintiff must then prove that the defendant's

proffered reasons are pretextual. This framework was recently reaffirmed in *United States Postal Service Board of Governors v. Aikens*, __ U.S. __, 103 S.Ct. 1478, __ L.Ed.2d __ (1983), where the Court reiterated its earlier statement in *Burdine* that once the defendant has carried his burden of production to rebut the *prima facie* case, any presumption of discrimination "drops from the case." *Id.* at 1482.

In the instant case, the Fifth Circuit's ruling is in conflict with these decisions because the presumption of discrimination resulting from the "inexorable zero" has been elevated to irrebuttable status; the presumption can never "drop" from the case; thus, the Appellate Court has stated that faced with a "zero", there is no legitimate, non-discriminatory reason which can be advanced by a defendant to explain the observed result.

The history of the Fifth Circuit's handling of the "inexorable zero" puts its flawed understanding in focus. The Court of Appeals first ran afoul in *Wilkins* when it carved the number zero out of the complex science of statistics and expounded that it was lay evidence in the realm of judges which carried special significance. Having made this fundamental wrong turn in *Wilkins*, a skewed path through the Fifth Circuit jurisprudence was not unpredictable: Next, it distorted this Court's view of the zero statistic by mischaracterizing the *Teamster* decision as having "*decried*" the "inexorable zero", when all the Supreme Court did was quote the Fifth Circuit's use of the term in a footnote.

Petitioner submits that the District of Columbia Circuit in *Valentino v. United States Postal Service*, 674 F.2d 56 (D.C. Cir. 1982), has kept the number "zero" in its

proper statistical place and has kept the "inexorable zero" in its proper judicial perspective, which is: that zero is evidence which can and may raise an inference of discrimination, but it is not "insurmountable."

CONCLUSION

The Court of Appeals exceeded the narrow scope of review in Title VII cases by reversing a finding of fact by the District Court which is not clearly erroneous and not erroneous at all. Furthermore, the Court of Appeals has created a new but improper standard of proof in Title VII cases, one which results in an irrebuttable presumption of discrimination where the specially significant "zero" is introduced. In all but the most exceptional case, there will be evidence of the availability of some members of a protected class for a particular job under study. Whenever that availability is contrasted against a zero, the instant decision will be relied upon to support an irrebuttable presumption of discrimination. Indeed, summary judgments on this issue would be a probable result of the Fifth Circuit's "inexorable zero".

Supreme Court jurisprudence has provided the framework for evaluating the evidence in Title VII cases. That framework and the pronouncements of this Court instruct the lower courts that Title VII cases, like other civil litigation, must be decided on the basis of the whole record. An irrebuttable presumption of discrimination is heretofore unknown in cases of this type. The opportunity to rebut a *prima facie* case, including the presumptions therein, should and must be preserved.

The instant case involves manifest error and harmful precedent. This Court is urged to correct the errors below.

Vacating the Fifth Circuit opinion and judgment is clearly warranted.

/s/ Daniel Lund

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NO.

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ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1983

K & B, INC.,

Petitioner,

VERSUS

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPENDIX

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APPENDIX "A"

Andra A. CAPACI,

Plaintiff-Appellant Cross-Appellee,

v.

KATZ & BESTHOFF, INC.,

Defendant-Appellee Cross-Appellant,

Equal Employment Opportunity Commission,

Intervenor-Appellant.

No. 82-3228.

United States Court of Appeals,
Fifth Circuit.

Aug. 8, 1983.

Claimant filed employment discrimination action alleging employing drugstore chain had discriminated against her by refusing to promote her to managerial position, subjecting her to disparate terms and conditions of employment, and retaliating against her after she filed sex discrimination charges with Equal Employment Opportunity Commission. The Equal Employment Opportunity Commission intervened. The United States District Court for the Eastern District of Louisiana, Fred J. Cassibry, J., 525 F.Supp. 317, held for the defendant company on all but minor aspect of employee's individual disparate treatment case, and employee and Commission appealed. The Court of Appeals, Reavley, Circuit Judge, held that: (1) use of census data by plaintiff's expert was not insufficiently refined

to make tests meaningful; (2) evidence of employer's advertising practices was evidence of discrimination which should have weighed heavily in Commission's favor; (3) trial court erred in not finding discrimination in manager trainee program; (4) trial court's refusal to admit personnel files of male employees during individual plaintiff's rebuttal was not abuse of discretion; (5) trial court's finding that employer's reasons for employee's treatment were not merely pretextual was not clearly erroneous; and (6) trial court's finding that employer had deliberately built up employee's personal file with disciplinary matters after charge was filed with purpose and effect of imparting to employee sense of harassment was not clearly erroneous.

Affirmed in part, reversed and remanded in part.

Harris & Kahn, Dona S. Kahn, Philadelphia, Pa., for Capaci.

Sandra G. Bryan, E.E.O.C., Jeffrey C. Bannon, Washington, D.C., for E.E.O.C.

Montgomery, Barnett, Brown & Read, Daniel Lund, James B. Irwin, New Orleans, La., for defendant-appellee cross-appellant.

Appeals from the United States District Court for the Eastern District of Louisiana.

Before BROWN, REAVLEY and RANDALL, Circuit Judges.

REAVLEY, Circuit Judge:

Andra A. Capaci and the Equal Employment Opportunity Commission (EEOC) brought this Title VII sex discrimination suit against Katz & Besthoff, Inc. (K & B), a drugstore company based in New Orleans. With the exception of one minor aspect of Capaci's individual disparate treatment case, the district court held for the defendant company after a bench trial. 525 F.Supp. 317 (E.D.La.1981). Numerous issues are raised on appeal, the most important of which concern the use and abuse of statistical techniques by the parties in the trial below. We hold that the district court was clearly erroneous in finding that the defendant had not discriminated against women in hiring manager trainees from 1965 through 1972. In all other respects we affirm.

I. CLASS CLAIMS

This suit began when Andra Capaci, then a pharmacist with K & B, filed a class action complaint under title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et. seq.*, alleging gender discrimination by her employer. The EEOC intervened, alleging that the defendant had failed to promote and hire females into management positions on the same basis as males.

K & B operates a chain of drugstores in New Orleans and several other towns and cities in Louisiana, Mississippi and Alabama. Managers at the stores fall into four categories: manager, assistant manager, relief manager and manager trainee. In those stores where the manager is not a pharmacist, a chief pharmacist is appointed to supervise the pharmacy department. On appeal as at trial, the case centers on the employment practices of K & B with respect to manager trainees and pharmacists.

A. Statistical Evidence.

The EEOC relied primarily on a statistical case presented through exhibits and the testimony of its expert witness, Dr. Gastwirth. K & B countered with testimony of its expert, Dr. Cranny. On appeal, the statistical methods used by the experts, rather than their raw data, are the major concern.

1. Manager Trainees

Manager trainees are hired both internally from the ranks of existing employees and externally from the civilian labor market. The only objective qualification is a high school diploma.

In our view the most important single fact presented to the district court is this: From July 1965, the effective date of Title VII, to January 1, 1973, the date just prior to Capaci's filing of discrimination charges, K & B hired or promoted 267 individuals to the position of manager trainee, of which 267 were male. The days of testimony that followed were consumed in part in determining whether or not this fact could be said to constitute statistically significant evidence of discrimination.

Dr. Gastwirth performed some rather sophisticated statistical tests for discrimination. He first determined a relevant labor market with which he could compare the proportion of females in management. Using 1970 census data, he looked to all managers in Louisiana and refined the comparison further by looking to experienced wholesale and retail managers, general merchandise retail managers, and department and sales managers. He made further refinements by looking to the census data for these categories

in three separate geographic locations—New Orleans, Baton Rouge, and the remainder of the state—and weighting the figures by the number of stores in each region. He then took the "lower bound" of these geographical weightings to be conservative,[1] and excluded those trainees hired outside of Louisiana. He also looked to managers earning less than $7,000 in 1969, on the assumption that those earning more would not be interested in the manager trainee position paying between $5,980 and $6,500 at that time. In short, he arrived at a number of comparable segments of the labor force, which ranged from 16% to 29% female. With all of the manager categories, these percentage figures were conservative, since, as even Dr. Cranny admitted on cross-examination, they underestimated present female availability by reflecting past discriminatory employment decisions.

Using this data, Gastwirth computed the probability that K & B's selections could have been made in an unbiased or random manner. Regardless of which "referent" group was used, for the period 1965—1972 the probability calculated was consistently far less than one in a billion.[2]

---

[1] The lower bound was derived by choosing the smallest percentage female figure found in the geographic regions for each occupational category.

[2] Manager Trainee Exhibit 3 is typical of several EEOC exhibits presented at trial:

> Statistical Tests Comparing Manager Trainee Hires With The Lower Bound for Various Labor Market Referents For The Period July 1, 1965 to January 1, 1973
>
> The exhibit reports the probability of observing 0 females out of the 265 persons hired directly as manager trainees from the inception of the Civil Rights Act until January 1, 1973 just prior to the charge. The results are given for the lower bound for any geographical weighting of the various external labor market referents.

Indeed, the highest probability of unbiased hiring was $5.367 \cdot 10^{-20}$, less than one in a billion billions.

Gastwirth performed comparable tests for manager trainees hired from 1973 through 1977, a period between the filing of the charge and the trial. During this period some female manager trainees were hired, but the vast majority of trainees chosen were male. The results of the tests, though considerably less dramatic than those of the 1965-1972 period, consistently showed the probability of such disparate hiring occurring by chance to be less than one in 10,000.

(Footnote 2 continued)

Referent	Theoretical Fraction	Probability of Observed Data
Civilian Labor Force	.3431	4.338×10^{-49}
Managers Earning Less than $7000 (in 1969)	.2899	3.978×10^{-40}
Experienced Wholesale & Retail Managers Earning Less than $7000 (in 1969)	.2507	6.078×10^{-34}
General Merchandise Retail Store Managers	.2364	9.109×10^{-32}
Department and Sales Manager (Retail Trade)	.2207	2.003×10^{-29}
All Managers	.1607	6.888×10^{-21}

NOTE: All probabilities are far less than one in a billion. The two and three standard deviations tests described by the Supreme Court in *Castanada v. Partida*, 430 U.S. 482, 97 S.Ct. 1272, 51 L.Ed.2d 498 (1977), correspond to probabilities of 1 in 20 (.05) and 1 in 100 (.01).

The probabilities in the last column are all less than one billionth of the probability levels used in *Castanada*.

The EEOC also relied on "applicant flow" data, that is, data on the number of men and women hired compared with the number who actually applied for the job. Only applications from July 1976 through 1977 were made available through discovery. This information indicated that 19.2% of the applicants for manager trainee were female, within the 16%-29% range Gastwirth predicted using census data. However, women made up only 9.2% of those chosen. Sixteen percent of the female applicants were successful, compared with 37% of the males. Using a chi-square test, Gastwirth determined that the probability of such hiring occurring by chance was less than one in a thousand.[3]

K & B attacked the EEOC statistical case in four

---

[3] Manager Trainee Exhibit 17 gives Dr. Gastwirth's test of the applicant flow data:

> Statistical Comparison of the Difference in the Proportion of Male and Female Applicants for the Manager Trainee Position Who Were Hired as Manager Trainees
>
> This exhibit calculates the chi-square test to determine whether the difference between the proportion of male applicants (37.37%) for the manager trainee position, during 1976 and 1977, who were actually hired as manager trainees, and the corresponding proportion of female applicants (15.96%) is statistically significant.

	Hired	Not Hired	Total
Males	148	248	396
Female	15	79	94
Total	163	327	490

> The value of the chi-square statistic is 14.75, which indicates that the probability of the observed data, under the hypothesis of equal hiring probabilities for applicants of each sex, is *less* than one in a thousand. This result is statistically significant and we conclude that the success rate of male applicants in the period (37.37%) is significantly greater than that of females (15.96%).

ways. It argued that: (1) the government failed to consider that women might not want the job and through "self-selection" would not apply; (2) Dr. Gastwirth failed to make various refinements in the census data necessary to make accurate comparisons; (3) the statistical tests looked only to external hiring of manager trainees and failed to consider internal promotions; (4) tests using data broken down by year and geographic location showed vastly reduced or no statistical significance. We find these objections less than convincing.

Certainly there is some merit to the self-selection argument. The district court found that "[t]he job requires the manager trainee to unload supply trucks, to put up stock, straighten up the store, and the work schedule includes night work, weekend and holiday work." 525 F.Supp. at 325. The court credited the testimony of Dr. Cranny, an industrial psychologist and labor economist, that such job conditions "would substantially retard females from applying as compared to males." *Id.* Several witnesses also testified that females had selected themselves out of the manager trainee job or applicant pool. This testimony emphasized in particular the unwillingness of women to work the hours required of manager trainees.

Despite this evidence, and deferring completely to the trial judge in weighing the credibility of these witnesses, we have great trouble accepting self-selection as an explanation for the complete absence of women in the manager trainee program for the seven and one-half year period preceding the discrimination charge. There is no reason to believe that the female witnesses called were representative of all women in the labor market or employed by the defendant. By looking to other merchandising, wholesale and retail, and department and sales managers, Gastwirth's statistical tests were

already corrected for self-selection to some extent, since all managers face hours and responsibilities that would not appeal to some women. Gastwirth testified that an applicant pool that was even 2% female would still have led to a finding of statistical significance for the 1965-1972 period. The applicant flow data indicated that 19.2% of manager trainee applicants were female, within the range found for other managers, and inconsistent with a theory of total self-selection. The defendant's witnesses also made clear that non-management and non-professional employees, 79% of whom are women, also have weekend and night duties and perform physical labor. Dr. Cranny stated that management trainees and assistant managers "do much of the same work as the rest of the people in the organization do."

K & B maintains that the census data used by Gastwirth was not sufficiently "refined" to make his tests meaningful. The district court found that "Dr. Gastwirth admitted that his groups include part time employees and the self-employed, some of whom are not potential applicants for the manager trainee position, and that no data was available to him to make the refinements," and that "[a]ll of the [Gastwirth comparison] groups included data on businesses not comparable to the K & B operation, such as boutiques and dress shops." 525 F.Supp. at 325, 328.

The use of census data is an appropriate method of demonstrating discrimination. *Hazelwood School District v. United States*, 433 U.S. 299, 97 S.Ct. 2736, 53 L.Ed.2d 768 (1977). The defendant would require refinements beyond that available in published statistics. A perfect statistical model is not required. *Phillips v. Joint Legislative Committee*, 637 F.2d 1014, 1025 (5th Cir.1981), *cert. denied*, 456 U.S. 960, 102 S.Ct. 2035, 72 L.Ed.2d 483

(1982); *Vuyanich v. Republic National Bank of Dallas*, 505 F.Supp. 224, 314 (N.D.Tex.1980). The defendant must do more than raise theoretical objections to the data or statistical approach taken; instead, the defendant should demonstrate how the errors affect the results, *Vuyanich, supra*, at 255-56, 306-07, particularly in cases where the plaintiff has demonstrated gross disparities in employer practices, *id.* at 357; *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 342 n. 23, 97 S.Ct. 1843, 1858 n. 23, 52 L.Ed.2d 396, 419 n. 23 (1977). In this case, the EEOC demonstrated that inclusion of self-employed persons actually increased the female percentage in the retail trade manager group from 15.44% to 18.72%. The Commission also points out that the general merchandise retail manager group it used, composed of 23.96% women statewide, does not include dress shops. Furthermore, there is nothing in the record suggesting that the census statistics systematically included stores likely to be managed by women, while excluding stores likely to be managed by men, such as gun shops or adult bookstores. It bears repeating that any applicant group composed of more than 2% women would have produced statistically significant results from the 1965-1972 period.

K & B contends that Gastwirth's statistics "are largely irrelevant because they ignore the established practice of K & B to look first to its existing work force for new manager trainee candidates before going outside." 525 F.Supp. at 324. This argument is singularly unpersuasive for the 1965-72 period. In that period, 265 manager trainees, all male, were hired from the external labor force. Two manager trainees, both male, were promoted internally. Including internal availability and promotion would have only increased the statistical significance of the results for this period, particularly since women constituted 79% of

the non-managerial and non-professional internal work force, a much higher percentage than that estimated for the relevant external labor force. Gastwirth also considered internal promotions along with external hiring for the 1973-1977 period in Manager Trainee Exhibits 12 and 13. Even without taking into account the higher proportion of females in the internal labor pool than in the external labor market, the probability of randomly selecting 20 females out of 365 persons hired directly or promoted from within was still less than 1 in 10,000.

Finally, K & B attempted to demonstrate that there was no statistically significant evidence of discrimination when the data was broken down by city or year or both. In our view, this was an unfair and obvious attempt to disaggregate that data to the point where it was difficult to demonstrate statistical significance. By fragmenting the data into small sample groups, the statistical tests became less probative. *Wheeler v. City of Columbus, Mississippi*, 686 F.2d 1144, 1151 (5th Cir.1982). Indeed, it became *impossible* to demonstrate significance with such small numbers in many instances since even a record of hiring or promoting zero women would not yield statistically significant results.[4] There was no reason to fragment the data

[4] K & B Exhibit 119 is an example of the defendant's "divide and conquer" technique:

GEOGRAPHICAL ANALYSIS AND STATISTICAL TEST UTILIZING CORRECTED 1977 APPLICATION FORM DATA AND HIRING DATA REFERRED TO IN EEOC MT EXHIBIT 16 & 17

LOCATION	SEX	APPLICANTS	HIRES	S.R.	STAT. TEST
Alexandria	M	26	1	3.8%	N.S.
	F	4	0	0.0%	

geographically since all hiring decisions regarding manager

(Footnote 4 continued)

GEOGRAPHICAL ANALYSIS AND STATISTICAL TEST UTILIZING CORRECTED 1977 APPLICATION FORM DATA AND HIRING DATA REFERRED TO IN EEOC MT EXHIBIT 16 & 17

LOCATION	SEX	APPLICANTS	HIRES	S.R.	STAT. TEST
Baton Rouge	M	25	14	56.0%	N.S.
	F	11	4	36.4%	
Bogalusa	M	5	2	40.0%	N.S.
	F	1	0	0.0%	
Gulfport	M	7	0	0.0%	N.S.
	F	3	0	0.0%	
Gonzales	M	1	1	100.0%	N.S.
	F	0	0	N/A	
Hattiesburg	M	22	1	4.5%	N.S.
	F	5	1	20.0%	
Houma	M	8	3	37.5%	N.S.
	F	1	1	100.0%	
Lafayette	M	33	2	6.1%	N.S.
	F	3	0	0.0%	
Lake Charles	M	12	3	25.0%	N.S.
	F	7	0	0.0%	
Long Beach	M	5	3	60.0%	N.S.
	F	2	0	0.0%	
Laurel	M	1	0	0.0%	N.S.
	F	0	0	N/A	
Mobile	M	25	3	12.0%	N.S.
	F	11	0	0.0%	
Monroe	M	1	1	100.0%	N.S.
	F	1	0	0.0%	
McComb	M	1	1	100.0%	N.S.
	F	0	0	N/A	

trainees are made at the firm's New Orleans office, and

(Footnote 4 continued)

GEOGRAPHICAL ANALYSIS AND STATISTICAL TEST UTILIZING CORRECTED 1977 APPLICATION FORM DATA AND HIRING DATA REFERRED TO IN EEOC MT EXHIBIT 16 & 17

LOCATION	SEX	APPLICANTS	HIRES	S.R.	STAT. TEST
Morgan City	M	5	1	20.0%	N.S.
	F	1	0	0.0%	
Natchez	M	2	1	50.0%	N.S.
	F	0	0	N/A	
New Orleans	M	51	39	76.5%	.01
	F	6	0	0.0%	
Opelousas	M	2	2	100.0%	N.S.
	F	0	0	N/A	
Pascagoula	M	8	1	12.5%	N.S.
	F	9	0	0.0%	
Ruston	M	2	1	50.0%	N.S.
	F	0	0	N/A	
Shreveport	M	50	3	6.0%	N.S.
	F	15	1	6.7%	
Thibodaux	M	3	1	33.3%	N.S.
	F	0	0	N/A	
Sulphur	M	1	0	0.0%	N.S.
	F	0	0	N/A	
Slidell	M	0	0	N/A	N.S.
	F	1	1	100.0%	
Vicksburg	M	2	2	100.0%	N.S.
	F	0	0	N/A	
No Area	M	3	0	0.0%	N.S.
	F	1	0	0.0%	

S.R. stands for selection ratio: N.S. means not significant. Another example of the defendant's fragmentation of data is found in the district court opinion, 525 F.Supp. at 326 n. 12.

liability is premised on "across-the-board" practices, *id.*, occurring at all locations. Likewise, liability is premised on actions taken within the entire 1965-1977 period, and there was no reason to fragment the data by year. Aggregating the data as the plaintiff did was a much more reasonable approach, since liability under Title VII depends on whether the EEOC demonstrated a "systemwide pattern or practice" of disparate treatment, rather than "the occurrence of isolated or 'accidental' or sporadic discriminatory acts. It had to establish ... [that] discrimination was the company's standard operating procedure—the regular rather than the unusual practice." *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 336, 97 S.Ct. 1843, 1855, 52 L.Ed.2d 396, 416 (1977).

2. Pharmacist Promotions

The testimony and exhibits concerning pharmacist promotions were more complicated than those for manager trainees, for several reasons. First, the EEOC was trying to demonstrate not only disparate treatment in selection for promotion but also in length of time to promotion. Second, the creation of the chief pharmacist position in 1967 had altered the chain of promotion and created two different lines of progression to storewide management. Third, K & B presented a strong statistical case of its own, rather than concentrating on refuting the EEOC statistics. The district court reported at length this aspect of the case. 525 F.Supp. at 328-334.

In light of the legal standards and the nonstatistical evidence discussed below, we have little trouble affirming the trial court's finding that pharmacist promotions were not made in a discriminatory manner. We discuss here the statistical evidence only in sufficient detail to explain why

we conclude that the findings are not clearly erroneous.

The EEOC's statistical case was not nearly as strong as with manager trainees. Generally, the data base was smaller, and the probability of random occurrence much higher than with the manager trainee tests. Ostensibly to control for seniority, Gastwirth had done tests for promotion during two different time periods. He compared the hiring and promotion of men and women in each period, but in so doing, disregarded women hired in period one and promoted in period two. Two of the original six chief pharmacists were women. The district court was suspicious of this "juggling of dates to eliminate from the data ... female pharmacists who were promoted after the effective date of the Act and before the date of the filing of the Capaci charge, so that 0 females was the consistent data tested." 525 F.Supp. at 334. With the help of 1973 Louisiana pharmacist data provided in an HEW Division of Manpower Intelligence report, Dr. Cranny demonstrated that 11% of the active pharmacists in Louisiana were female. The comparable figure was 9% for Louisiana community chain pharmacies and 13.3% for K & B. Of promotions to chief pharmacist from 1965 to 1973, 13.3% were women, the same percentage as for female pharmacists employed at K & B. The male and female selection ratios were also identical at 15%, indicating that the chances of promotion were the same for men and women.

B. Other Evidence

1. Employee Testimony

The defendant relied heavily on testimony of former and present employees to demonstrate that it did not discriminate against women. The district court was entirely

correct in admitting and considering such testimony. While statistics alone may reveal a great deal, the testimony of employees "about their personal experiences with the company" are useful to bring "the cold numbers convincingly to life." *International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 339, 97 S.Ct. 1843, 1856, 52 L.Ed.2d 396, 417 (1977).

The Commission relied on the testimony of several women to demonstrate disparate treatment of female job applicants and employees. For various reasons the district court did not credit their testimony. 525 F.Supp. at 334-36. The defendant called numerous past and present employees concerning its hiring and promotion practices, including over a dozen women who had served in management and several key male executives who set corporate policy.

The trial was consumed in large part by the testimony of these and other fact witnesses. We do not attempt a comprehensive summary here. After reviewing the record with some care, we find that K & B made a sizable and respectable presentation of testimonial evidence that it did not discriminate against women after the Capaci charge was made. However, what little testimonal evidence was presented concerning practices prior to the charge does not support the same conclusion.

As with the statistical evidence, we concentrate our concern on the period from July 1965, the effective date of Title VII, to January 11, 1973, the date Capaci filed her charge with the EEOC. We cannot review the lay testimony without at least an occasional glance at the raw numbers. At oral argument, K & B asked us to consider its Exhibit 110, described by counsel as one "of critical

significance." The exhibit lists all females who ever entered management from 1947 through 1978. Of the fifty-one women, thirty-eight, or 75%, entered management after Capaci filed her charge. Twenty-one of those thirty-eight entered management only after the EEOC's intervention into the case in January 1977. During the July 1965-January 1973 period, only four women are listed, three of whom assumed posts as "cosmetic supervisors," an all-female position. The fourth, Josephine Liuzza, first hired by K & B in 1931, was promoted to chief pharmacist in 1968.

The district court opinion made specific reference to the testimony of four former female managers. "The testimony of Genevieve Ronquette, Lillian Hennessey, Blanche Callihan and Inez Nungesser is to the effect that they were not treated differently from males by K & B in promotion to management." 525 F.Supp. at 337. We find their testimony unhelpful on the issue of discrimination against manager trainees in the 1965-1972 period. All four had entered management prior to the effective date of Title VII. Hennessey, Callihan and Nungesser all testified that men and women were treated equally at K & B, but indicated complete unfamiliarity with the manager trainee program. Ronquette testified primarily on advertising practices, discussed further below, but mentioned that she was familiar with the manager trainee program. She testified that *she* did nothing to discriminate against women, but did not discuss whether the firm as a whole had committed such acts.

Nearly all of the other female managers who testified —Johnson, Boudreaux, Bonvillain, Robottom, Falcon, Feigel, Lachaussee and Choate—were promoted after the charge was filed. There is no reference by name to any of

these witnesses in the district court opinion indicating that their testimony was significantly relief upon by the trial judge in reaching his conclusions. The only female member of management promoted during the 1965-1972 period who was called to the stand was June Buras, a cosmetic supervisor. She testified about specific events involving Ms. Capaci and Louise Oregon, another witness who had claimed disparate treatment and had testified for the EEOC. Buras was not asked and offered no opinion of storewide practices and policies regarding women.

The male executives of the company who testified indicated that K & B did not discriminate against women. However, if carefully examined their testimony does not support a finding of nondiscriminatory treatment in the 1965-1972 period.

Sidney J. Besthoff, III, the president of K & B, testified that "the early thrust of the Civil Rights Act was to prevent discrimination by race," and that upon its passage, the firm took active steps to set up a "complete program" in regards to racial aspects of the Act. Noting that "[t]he sex aspect of the discrimination was passed as a part of the Civil Rights Act as an afterthought," he stated that the firm's initial concern was with racial minorities and that "for various reasons, we did not have any real interest in the 1950's or the 1960's in women in management." At another stage of the trial he stated: "So when we had fairly well gotten into the racial problem and we thought that we had handled that problem adequately, racial discrimination in employment, we then went on to the other aspects of the Act, the sex aspect of the Act and beginning in the early 1970's we began a program of bringing women into our management at that time." He admitted in deposition testimony read at trial that the Capaci

charge had "spurred us to review more carefully the use of females in management and to encourage the hiring and promotion of females within the company."

Walter Feltman, vice president and operations director of the company, testified at length about many aspects of the case. He stated that K & B tried to recruit actively females for management, some as early as 1968. When asked to described the company's experience since 1970 regarding the active recruiting of women, he stated that "once we gained some success, in '73 or '74, we gained a little success in recruiting some of the females, it then started to accelerate and it started, you could use the word 'snowball,' I guess, and it's continuing that way ...."

The earliest printed statement of K & B policy not to discriminate in the record is an Employee Handbook dated May 1973. Feltman also indicated that the firm had adopted an "affirmative action plan," set out in a short booklet dated January 1976. The booklet states in substance that "Katz & Besthoff, Inc. is committed to providing equal opportunity to all," that "[t]raining programs at K & B are available on a non-discriminatory basis" and that while promotions are "made on the basis of an individual's demonstrated performance and qualifications" managers should look for qualified people "with special emphasis for women and members of minority groups."

The district court reached the following findings based on the oral testimony:

> William Serda became personnel director in March 1971, and at that time there were still only four females in management,—one manager, one assistant manager, one chief pharmacist, one

> cosmetics supervisor. He realized that this situation made the company vulnerable to charges of violation of the federal law against discrimination, and for that reason and the additional reason that the company had an urgent need for manager trainees in the expansion program, which was within his area of responsibility, he made the recommendation to his superior Walter Feltman in 1971 or 1972 that females be encouraged to apply for managerial positions. The recommendation for affirmative action was taken under advisement, but was ultimately approved.
>
> The promotion record does not indicate that the implementation of Serda's recommendations was immediate, and the written affirmative action policy was not published until 1976. Besthoff agreed that the Capaci charge was the impetus for the implementation of Serda's affirmative action recommendation.

525 F.Supp. at 338.

K & B presented an impressive group of fact witnesses at trial. The district court was entitled to rely on them as it saw fit. However, there is little if any testimonial evidence to counter the strong statistical case concerning manager trainees chosen before the Capaci charge.

2. Advertising Evidence

The EEOC relied at trial on the content and placement of job vacancy advertisements in newspaper classified sections from 1965 to 1971. Again, the evidence here concerns the period about which we are most concerned, namely, the period after the effective date of Title VII and before the Capaci charge.

The Commission argued that the advertisements were discriminatory for two reasons. First, the content of several advertisements indicated a preference for males in management openings and a preference for females in non-management positions. A series of advertisements run in the Baton Rouge Morning Advocate expressed an interest in "qualified young men" to train for store management positions.[5] A 1965 advertisement placed in the New Orleans Times Picayune sought "Local Men 23 to 45 to train as assistant to ice cream plant manager," and a 1971 advertisement in the Times Picayune for a personnel director stated: "We are seeking a vital, aggressive man who is ready to realize his potential." *See* 525 F.Supp. at 339 n. 29. In contrast, a number of other advertisements sought

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[5] An example is a September 22, 1968 want ad:

KATZ & BESTHOFF
OPENING 3 COMPLETE DRUG STORES IN THE BATON ROUGE AREA AND IS LOOKING FOR QUALIFIED YOUNG MEN TO TRAIN FOR STORE MANAGEMENT
Locations of the Stores
7543 Jefferson Hwy.
5840 Plank Road
11288 Florida Blvd.
EXCELLENT FUTURE
Starting Salary
$455 PER MONTH
48 Hour Week
FRINGE BENEFITS INCLUDE:
Hospitalization
Life Insurance
Disability Insurance
Excellent Retirement Plan
Paid Vacations
Discounts
For Further Information Call Collect to
Mr. Henry Gabb
523-1234
New Orleans, La.

"counter girls" and "salesladies" for non-management positions.

The Commission also pointed out that the advertisements for manager trainees, even when gender-neutral in content, were routinely placed in the newspapers' "Help Wanted-Male" or "Male Help Wanted" columns. At that time, the Times Picayune had columns designated "Help Wanted-Male," "Help Wanted-Female" and "Help Wanted-Male or Female." The Morning Advocate had columns designated "Male Help Wanted," "Female Help Wanted" and "Help Wanted." Frequently, advertisements for secretaries, salesladies, counter girls, counter clerks and cashiers—all non-management positions—were placed in the female columns, while advertisements for a manager trainee, "career in management," fountain manager trainee and personnel director were found in the male columns.

We find that the advertising evidence is evidence of discrimination. While not determinative by itself, it should have weighed in the EEOC's favor. None of the reasons given by the district court and by the defendant for disregarding this evidence are persuasive.

The district court noted that EEOC regulations prior to 1969 did not prohibit neutral advertising under male or female newspaper headings.[6] However, this circuit has

[6] The 1966 version of 29 C.F.R. § 1604.4(b) read:

> Advertisers covered by the Civil Rights Act of 1964 may place advertisements for jobs open to both sexes in columns classified by the publishers under "Male" or "Female" headings to indicate that some occupations are considered more attractive to persons of one sex than the other. In such cases, the Commission will consider only the advertising of the covered employer and not headings used by publishers.

Later regulations disapproved of such advertising.

held that placing advertisements for flight attendants in female columns without corresponding advertisements in male columns is an unlawful employment practice under section 704(b) of Title VII, 42 U.S.C. § 2000e-3(b), since sex is not a bona fide occupational qualification for that position. *Hailes v. United Air Lines,* 464 F.2d 1006 (5th Cir.1972). The advertisement in question in that case was placed in a New Orleans newspaper in 1967, contemporaneously with the K & B advertisements at issue here. While administrative interpretations of statutory meaning are entitled to deference, *Batterton v. Francis,* 432 U.S. 416, 424, 97 S.Ct. 2399, 2405, 53 L.Ed.2d 448, 456 (1977), a prior panel decision of the circuit is entitled to more than deference, and cannot be overruled by a later panel, *Gates v. Collier,* 616 F.2d 1268, 1272 (5th Cir.1980). Were it simply a matter of choosing an authority to follow, we would adhere to the law of our circuit. This entire argument, however, is somewhat off the mark. K & B was not sued for discriminatory advertising. While such practices are expressly prohibited by Title VII, 42 U.S.C. § 2000e-3(b), the class aspect of this suit was brought for discriminatory treatment of female employees under 42 U.S.C. § 2000e-2(a). The plaintiff claiming disparate treatment of women as a class must establish a pattern and practice of gender-based discrimination by the employer, and must also establish discriminatory motivation. *Wheeler v. City of Columbus, Mississippi,* 686 F.2d 1144, 1150 (5th Cir.1982). Especially since the defendant has never claimed that it actually relied upon or was even aware of the then-existing EEOC guidelines, the advertising evidence is useful and probative insofar as it goes to establish motivation and hiring policies.

At trial, retired employment manager Genevieve Ronquette took responsibility for the placement and

wording of some of the advertisements. She was the first woman ever appointed to a management position at K & B. The district court and the defendant apparently rely on two arguments concerning Ronquette's actions. One argument is that Ronquette "had no instructions [from higher management] as to the column in which the ads should be placed ...." 525 F.Supp. at 339. We fail to see why this fact matters. Ronquette held a position in storewide management and was touted by K & B as living proof that it does not discriminate against women and does promote them to important management posts. She acted for management and the defendant is responsible for those actions. Liability under Title VII is not limited to acts of the chairman of the board or other males at the very top of the corporate pyramid.

The district court, impressed with Ronquette as a truthful witness, also relied on the finding that "her practices in composing and placing ads were not to carry out any policy of discrimination against women, but to achieve the best results from the ads in light of her experience as to the gender which would be more interested in the job vacancy being advertised." 525 F.Supp. at 340. We find little if any testimony in the record to support this conclusion with respect to management positions. When counsel pointed out that advertisements for manager trainees usually ran in the male columns, her response was: "Well, that was because managers were always males. So, I put it in the male column." Furthermore, even if the advertisements were placed out of a sincere belief that females would not be interested in the job, such a belief is precisely the kind of stereotyped assumption that Title VII is aimed at eliminating.

Before the Civil Rights Act of 1964 was enacted,

> an employer could fashion his personnel policies on the basis of assumptions about the differences between men and women, whether or not the assumptions were valid.
>
> It is now well recognized that employment decisions cannot be predicated on mere "stereotyped" impressions about the characteristics of males or females....The statute makes it unlawful "to discriminate against any *individual* with respect to his compensation, terms, conditions, or privileges of employment, because of such *individual's* race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1) (emphasis added). The statute's focus on the individual is unambiguous. It precludes treatment of individuals as simply components of a racial, religious, sexual, or national class....Even a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply.

City of Los Angeles, Department of Water and Power v. Manhart, 435 U.S. 702, 707-08, 98 S.Ct. 1370, 1375, 55 L.Ed.2d 657, 664-65 (1978).

K & B points out that other advertisements it introduced were neutral as to gender. This argument goes to the weight of the EEOC evidence, but does not completely eliminate its importance. Finally, we note that K & B faces a dilemma. If the advertising did in fact deter women from applying for management positions, then its effect was discriminatory. On the other hand, if there were no adverse effects on women, then Dr. Gastwirth's statistical case is strengthened, and the defendant faces a great, and in our view insurmountable, challenge to explain why all 265 manager trainees hired from the external labor force in the

1965-1972 period were men.[7]

C. Disposition on Appeal

The scope of review in this case is a narrow one. We are confined to asking whether the district court was clearly erroneous in finding that K & B did not discriminate in hiring manager trainees and promoting pharmacists. Fed.R.Civ.P. 52(a); *Pullman-Standard v. Swint*, 456 U.S. 273, 102 S.Ct. 1781, 72 L.Ed.2d 66 (1982); *Chaline v. KCOH, Inc.*, 693 F.2d 477, 480 (5th Cir.1982). We cannot hold a factual conclusion clearly erroneous unless it "is

[7] As a final argument, the EEOC maintains that K & B violated the record-keeping provisions set out in 29 C.F.R. § 1602.14 by destroying applications for the manager trainee position. The regulation requires preservation of personnel records for six months from the date of the making of the record or the personnel action, and continued preservation of all relevant records once a charge of discrimination has been filed. The Commission argues that violating this regulation should raise a presumption that the applicant flow data would have confirmed its case, citing *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 66 S.Ct. 1187, 90 L.Ed. 1515 (1946); *United States v. County of Fairfax, Virginia*, 629 F.2d 932 (4th Cir.1980), *cert. denied*, 449 U.S. 1078, 101 S.Ct. 858, 66 L.Ed.2d 801 (1981). K & B argues, and the district court agreed, that no violation occurred because applicant flow data was made available for the period dating from six months before the EEOC moved for intervention on January 4, 1977, arguably the first date that an issue regarding discrimination in initial hiring (as opposed to promotion) was raised.

We find the Commission's allegation important and troubling. Curiously, the district court refused to allow any inquiries during discovery and trial into when and why earlier records were destroyed, and went on to hold that "[t]he EEOC has presented a less than impressive statistical case" because "[a]s the defense unfolded, it became obvious that the EEOC needed applicant flow data to make a strong statistical case as to the manager trainee job." 525 F.Supp. at 341. Nevertheless, even if we agree with the Commission that under the law and the facts of this case it was entitled to a presumption that the missing data would have bolstered its statistical case for the period after the charge was filed, we find that the defendant presented sufficient evidence to overcome any such presumption.

so against the great preponderance of the credible testimony that it does not reflect the truth of the case," *Merchants National Bank of Mobile v. Dredge General G.L. Gillespie*, 663 F.2d 1338, 1341 (5th Cir.1981), *cert. dismissed*, 456 U.S. 966, 102 S.Ct. 2263, 72 L.Ed.2d 865 (1982), or unless we are "left with the definite and firm conviction that a mistake has been committed," *United States v. United Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746, 766 (1948).

Statistics play an important and often controversial role in cases of this type. In a proper case, gross statistical disparities may alone constitute prima facie proof of a pattern or practice of discrimination. *Hazelwood School District v. United States*, 433 U.S. 299, 307-08, 97 S.Ct. 2736, 2741, 52 L.Ed.2d 768, 777 (1977). Likewise, statistical evidence may be used to establish discriminatory motive, a necessary element of a Title VII disparate treatment claim. *Pouncy v. Prudential Insurance Co. of America*, 668 F.2d 795, 802 (5th Cir.1982). Of course, numerical data is not irrefutable and must be used properly.[8] *Id.*

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[8] To quote one skeptic:

> In the space of one hundred and seventy-six years the Lower Mississippi has shortened itself two hundred and forty-two miles. That is an average of a trifle over one mile and a third per year. Therefore, any calm person, who is not blind or idiotic, can see that in the Old Oolitic Silurian Period, just a million years ago next November, the Lower Mississippi River was upward of one million three hundred thousand miles long, and stuck out over the Gulf of Mexico like a fishing-rod. And by the same token any person can see that seven hundred and forty-two years from now the Lower Mississippi will be only a mile and three-quarters long, and Cairo and New Orleans will have joined their streets together, and be plodding comfortably along under a single mayor and a mutual board of aldermen.

M. Twain, Life on the Mississippi, *quoted in* D. Huff, How to Lie with Statistics 142 (1954).

This court and this panel take the clearly erroneous standard seriously, particularly in light of recent admonishment by the Supreme Court that we properly defer to district court fact findings in discrimination cases as we would in any other case. With this standard firmly in mind, we have little trouble affirming the district court on the issue of discrimination in promoting pharmacists, for the reasons described above. We also affirm the findings with regard to manager trainee hiring after the Capaci charge was filed. The statistical evidence was relatively weak, the testimonial evidence strong and there was no questionable advertising during this period.

We hold that the court erred, however, in not finding discrimination in the manager trainee program during the 1965-72 period. Summarizing the discussion of this period given above, there was: (1) an overwhelmingly strong statistical case; (2) a dearth of meaningful testimony by employees to rebut the numbers; (3) newspaper advertising which, while not determinative in itself, must be viewed as some evidence of discrimination.

We cannot escape the fact that during these seven and one-half years, there were hundreds of male manager trainees chosen and not a single woman. The hiring record demonstrates not just disparities in hiring, but *total exclusion* of women from the entry level management position. We differ with the defendant's suggestion that "zero is just a number." To the noble theoretician predicting the collisions of weightless elephants on frictionless roller skates, zero may be just another integer, but to us it carries special significance in discerning firm policies and attitudes. Evidence of two or three acts of hiring women as manager trainees during this period might not have affected the statistical significance of the tests performed by the

experts, but it would indicate at least some willingness to consider women as equals in firm management. Perhaps for this reason, the courts have been particularly dubious of attempts by employers to explain away "the inexorable zero" when the hiring columns are totalled. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 342 n. 23, 97 S.Ct. 1843, 1858 n. 23, 52 L.Ed.2d 396, 419 n. 23 (1977), *vacating United States v. T.I.M.E.-D.C., Inc.*, 517 F.2d 299, 315 (5th Cir.1975); *Wilkins v. University of Houston*, 654 F.2d 388, 410 (5th Cir.1981), *cert. denied*, __ U.S. __, 103 S.Ct. 51, 74 L.Ed.2d 57 (1982).

II. CAPACI'S INDIVIDUAL CLAIM

In her individual claim Andra Capaci asserted that K & B had discriminated against her by denying her promotion into management, subjecting her to sexual harassment, and harassing and discharging her in retaliation for filing discrimination charges. In a careful and thorough discussion the trial court rejected most of the allegations, but agreed with Capaci that K & B had deliberately built up her personnel file with disciplinary matters after the charge was filed, with the purpose and effect of imparting to Capaci a sense of harassment. 525 F.Supp. at 342-50.

Capaci rested her case on March 5, 1979, after many days of trial. On March 26, 1979, during the defendant's case in chief, Capaci's attorney was removed from the case, held in contempt and suspended from practice in the trial judge's court for his behavior during the period of the trial. Her case was severed from the EEOC case and trial proceeded for five days, during which Capaci had no legal representation. More than a year later, on April 14, 1980, Capaci's rebuttal case was presented by a new attorney and the trial came to an end. Several arguments on appeal

concern the individual claim.

A. The Refusal to Receive Personnel Files During Rebuttal

On the last day of trial the plaintiff's new attorney attempted to introduce into evidence the personnel files of 123 males. The purpose of this evidence was to demonstrate that men who committed acts similar to those allegedly committed by Capaci were treated more leniently than she, and that the reasons offered to explain her treatment were hence pretextual. The trail judge refused to allow the evidence to be introduced in rebuttal, because he found that the files should have been introduced during the case in chief, if at all, under the circumstances of the case.

The plaintiff asserts that this evidence was legitimate proof of pretext, and as such was properly offered in rebuttal under the three-step approach for deciding Title VII cases set out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). That case established that once a plaintiff has made a prima facie showing of discrimination, the defendant must "articulate some legitimate, nondiscriminatory reason for the employee's rejection." 411 U.S. at 802, 93 S.Ct. at 1824, 36 L.Ed.2d at 678. Once this second step has been met, the plaintiff "must...be afforded a fair opportunity to show that [defendant's] stated reason for [plaintiff's] rejection was in fact pretext." 411 U.S. at 804, 93 S.Ct. at 1825, 36 L.Ed.2d at 679. Capaci sees these three steps in *McDonnell Douglas* as corresponding to the three major stages of the traditional trial: plaintiff's case in chief, defendant's case in chief, and plaintiff's rebuttal. She argues, therefore, that the trial judge was incorrect in viewing the offered evidence of pretext as inappropriate at the rebuttal stage.

We do not believe that *McDonnell Douglas* requires presentation of proof in a strictly ordered fashion corresponding to the three traditional stages of trial. "The tripartite arrangement is a useful tool in analyzing these controversies, but it should not be construed so as to divide a single cause of action into three different cases." *Whack v. Peabody & Wind Engineering Co.*, 595 F.2d 190, 193 (3rd Cir.1979). "Although cases are analyzed in terms of these three phases, there is no requirement that the evidence be introduced in such compartmentalized form." *Worthy v. United States Steel Corp.*, 616 F.2d 698, 701 (3d Cir.1980). The *McDonnell Douglas* decision, "did not purport to create an inflexible formulation," *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 358, 97 S.Ct. 1843, 1866, 52 L.Ed.2d 396, 429 (1977), and sets out a method that "was never intended to be rigid, mechanized, or ritualistic," but instead "is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination," *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577, 98 S.Ct. 2943, 2949, 57 L.Ed.2d 957, 967 (1978). Most trials would be lopsided indeed if plaintiffs were confined to making the usually simple presentation of proof required to establish a prima facie case[9] in their case in chief, leaving all other complex questions of pretext, disparate treatment, legitimate grounds for rejection of

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[9] Establishing a prima facie case of racial discrimination under *McDonnell Douglas* requires only that the plaintiff show:

> (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

411 U.S. at 802, 93 S.Ct. at 1824, 36 L.Ed.2d at 677.

the plaintiff, prior history of discrimination, etc., to be litigated in later stages of the trial.

In short, *McDonnell Douglas* did not radically alter the ordinary rules of evidence, procedure and practice followed by the courts in all trials. The trial court may, subject to review only for abuse of discretion, maintain the pace of the trial, *Moore v. United States*, 598 F.2d 439, 442 (5th Cir.1979), determine the relevancy and materiality of evidence, *United States v. Ashley*, 555 F.2d 462, 465 (5th Cir.), *cert. denied*, 434 U.S. 869, 98 S.Ct. 210, 54 L.Ed.2d 147 (1977); *United States v. Calles*, 482 F.2d 1155, 1160 (5th Cir.1973), and decide generally whether or not to admit evidence, *Miller v. Universal City Studios, Inc.*, 650 F.2d 1365, 1374 (5th Cir.1981).

For several reasons we do not find that the trial judge abused his discretion in refusing to admit the personnel files. Based on the extensive discovery and pre-trial order, the plaintiff's attorney was fully aware of the defendant's proffered reasons for failing to promote and discharging her. The questions of disparate treatment and pretext were intertwined under the facts of this case, and were extensively litigated in the plaintiff's case in chief. Employee files and the testimony of many witnesses were introduced at that time. The court made specific findings on issues of pretext in lack of promotion and discharge. 525 F.Supp. at 345, 350. All of the files the plaintiff's attorney wished to introduce were in the courtroom throughout the trial. The trial judge felt that the new attorney, with a complete transcript of the thirty-four days of trial that had transpired a year earlier, was simply attempting to retry the case, as he made clear on the last day of trial.

I know, but you reviewed the record, and you're

> second guessing Mr. Schumacher. You are saying now, well he didn't try the case right. He didn't try the case so we could win it, so I'm going to try it over again. And that we cannot do. If Mr. Schumacher hadn't been an able lawyer I might, well, I might have to do it anyhow, but I would be more inclined, but Mr. Schumacher exhausted all this. I was leaning over backwards during that trial to give this plaintiff every opportunity to get her case before me. If you read that record, you could see that I did.

We agree that the plaintiff was given ample opportunity to prove her case.

Numerous concerns faced the trial judge. He was no doubt concerned that the plaintiff should not benefit from the sins of her previous attorney, to the unfair detriment of the defendant, by having a new attorney with an unusual opportunity to carefully and leisurely review the transcript and to offer a new approach to trying the case. He was faced with legitimate concerns of the defendant and other litigants on his docket to see this case end. The defendant also argued that the files were cumulative, and that they were offered "in a vacuum" without any testimony that would make for meaningful comparisons or tell the whole story of what happened to the employees reviewed in the files. Under these circumstances we find no error.

B. Evidence of Pretext

Capaci argues on appeal that, even without the introduction of the 123 employee files, there was overwhelming evidence that K & B's reasons for her treatment as a pharmacist were pretextual.

The reasons given by the defendant for not promoting Capaci were numerous, based in large part on alleged lack of concentration and disorganization, and inability to work well with others. The specific complaints against her included "tardiness, excessive time on the telephone, too frequent and prolonged absences from the prescription department for talks with customers, visits to the cosmetic department to assist customers, attention to personal matters and application of makeup while on duty." 525 F.Supp. at 343.

Capaci was allegedly fired because of the "Lambremont" incident one evening in which she: (1) created customer dissatisfaction by taking an inordinate amount of time to fill prescriptions; (2) invited a customer into the prescription department against company policy; (3) offered medication to a customer who was not the person for whom the prescription was made.

Capaci argues that males who committed similar acts, such as giving pills to customers, shaving on duty and talking excessively on the phone, had not been disciplined and in some cases had been promoted, and that the two major reasons given by one official for discharge were gross dishonesty and irregularity in dispensing drugs.

These comparisons do not render the trial court's findings on pretext clearly erroneous. The plaintiff was portrayed as a singularly inefficient and contentious employee. One executive described her as unstable and immature; another "described her attitude after she filed her charge as having placed herself in a protective cocoon." 525 F.Supp. at 350. She was unable to work well with any of her managers or chief pharmacists, and they consistently sought to have her fired or transferred to other stores. Six

of these transfers between 1970 and 1973 are chronicled in the district court opinion. 525 F.Supp. at 344-345. One manager described her as "probably the worst pharmacist that I ever had working for me." A co-worker stated that "I have never worked with another pharmacist who was as disorganized....she, in comparing her with other pharmacists that I have worked with, had no awareness of trying to fill prescriptions or trying to get the work out." On four occasions prior to filing the charge her superiors endeavorded to have her fired. On the last occasion, vice president Feltman, personnel manager Serda, and supervisors LeBlanc and Levet all agreed that she should be terminated, but Sydney Besthoff, III, the president, decided to give her another chance, out of an interest in reducing turnover in the professional staff and a hope that the problems could be overcome. K & B has maintained that the Lambremont incident was the last straw. Under these facts, the court's findings are amply supported.

C. The Severance

As explained above, Capaci's claim was severed from the EEOC case and the trial proceeded for five days after her attorney was suspended. She now complains that during those five days evidence prejudicial to her case was admitted, and that her due process rights were thus violated. She argues that the trial should have been continued to allow her to seek new counsel, rather than allowing it to proceed without legal representation for her.

Decisions regarding continuances and severances of actions are left to the trial court's discretion and will not be disturbed absent an abuse of discretion. *American Lease Plans, Inc. v. Silver Sand Co. of Leesburg*, 637 F.2d 311, 318 (5th Cir.1981) (continuance); *United States v. Swanson*,

572 F.2d 523, 528 (5th Cir.), *cert. denied*, 439 U.S. 849, 99 S.Ct. 152, 58 L.Ed.2d 152 (1978) (severance); *Hertz Corp. v. Cox*, 430 F.2d 1365, 1372 (5th Cir.1970) (severance). The trial judge endeavored to protect Ms. Capaci's rights, while letting the other parties continue to litigate their claims. As he stated in court after suspending her attorney:

> So there will be no misunderstanding, the case of Ms. Capaci is suspended as of now, as of this morning. I will disregard any evidence that has any direct effect upon her case unless it also affects the EEOC's case. As far as her case is concerned, though, I will disregard it until she has her lawyer and her trial is resumed and if necessary we will call back the same witnesses that we are calling now which you think you may need to defend yourself in her case. I am doing this, stating that so that she will have a chance to fully cross-examine any witness which might affect her case.

Months later, Capaci had a new attorney, and with the benefit of a transcript of the entire trial to that point, she was allowed to present rebuttal testimony. On appeal, Capaci does not clearly specify any evidence relied upon by the district court in reaching its decision that was introduced during the five days she was without an attorney and that she was not allowed to refute during her rebuttal on the last day of trial. We find no abuse of discretion.

D. The Cross-Appeal

After the discrimination charge was filed in 1973 Mr. Feltman issued instructions that unusual occurrences involving Ms. Capaci should be documented in her personnel file. He testified that this effort was not to harass her but to "correct the error K & B had made in not having her

performance documented previous to the charge." 525 F.Supp. at 347. The court found that "[t]he result of his instructions, however, was the building of a file which included reports of trivial, petty, insignificant events involving Capaci, which would never have appeared in the file of another employee. These could serve no purpose other than to impart to Capaci a sense of harassment." *Id.* K & B argues that it was reasonably justified in documenting unusual occurrences based on its prior experiences with Capaci. While such an argument is plausible, the trial court's finding is not clearly erroneous. Before the charge was filed the plaintiff's file contained only a few complimentary letters from customers and Mr. Besthoff. Two years after the charge the file contained approximately 100 discipline slips.

III. CONCLUSION

We reverse the finding of nondiscrimination in the selection of manager trainees for the period July 1965-December 1972, and remand for determination of appropriate remedies. In all other respects we affirm.

AFFIRMED IN PART, REVERSED AND REMANDED IN PART.

APPENDIX "B"

Andra A. CAPACI,

Plaintiff,

and

Equal Employment Opportunity Commission,

Plaintiff-Intervenor,

v.

KATZ & BESTHOFF, INC.,

Defendant.

Civ. A. No. 74-2743.

United States District Court,
E. D. Louisiana.

Oct. 15, 1981.

Claimant filed employment discrimination action alleging that employing drugstore chain had discriminated against her by refusing to promote her to managerial position, subjecting her to disparate terms and conditions of employment, and retaliating against her after she filed sex discrimination charge with EEOC through harassment, denial of wage increase, and discharge from employment. The EEOC intervened. The District Court, Cassibry, J., held that: (1) EEOC had not proved by preponderance of evidence its claim that employing drugstore chain had policy of excluding females from management positions; (2) claimant had established prima facie case of discrimination in drugstore chain's failure to promote her to management

position; (3) drugstore chain had articulated legitimate, nondiscriminatory reason for failing to promote claimant, claimant had failed to show that reason was pretextual, and thus had failed to discharge her burden of proof to show that employer discriminated against her on basis of her gender with regard to management position; (4) claimant had not shown that employer failed to investigate her complaint of improper sexual advances or that it took inappropriate action, and thus sexual harassment claim had to be denied; (5) building claimant's personnel file constituted harassment in retaliation for filing of charges; and (6) claimant had not shown that her discharge was a retaliatory action.

Judgment accordingly.

Carl J. Schumacher, Jr., New Orleans, La., Dona S. Kahn, Philadelphia, Pa., for plaintiff.

James E. Miller, Cassandra M. Menoken, and Ethel M. Mixon, for plaintiff-intervenor.

Daniel Lund, James B. Irwin, New Orleans, La., for defendant.

CASSIBRY, District Judge:

The plaintiff Andra Capaci filed this employment discrimination suit on October 8, 1974, alleging that the defendant Katz & Besthoff, Inc., [K&B] had discriminated against her by (1) refusing to promtoe her to a managerial position while it continually promoted less qualified male employees; (2) subjecting her to disparate terms and conditions of employment; (3) retaliating against her after she

filed a charge with the Equal Employment Opportunity Commission [EEOC] through harassment and denial to her of a standard wage increase accorded to most other employees, and, finally, discharging her from her employment.

The court has jurisdiction of this sex discrimination case under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq.

The EEOC which had determined as a result of the charges filed with it by the plaintiff in January, May and August 1973 that K&B had in fact discriminated against her, both by refusing to promote her and by retaliating against her for filing a charge, was permitted to intervene in the suit on July 19, 1977. Upon motion of the defendant the previously certified class was decertified on the condition that the EEOC would be permitted to prosecute the claims of the class. The EEOC took an active role in the trial of the case to prove that K&B had a policy and practice of discrimination against females by excluding them as a class from management positions. The trial of the case was limited to the liability issues.

The plaintiff Andra Capaci, a female registered pharmacist, has been an employee of K&B in the New Orleans, Louisiana metropolitan area since 1963.[1] K&B is a Louisiana Corporation domiciled in the City of New Orleans which operates a chain of drug stores in Louisiana, Mississippi and Alabama. The company, including its predecessor Katz & Besthoff, Ltd., has grown from one store opened in New Orleans in 1905 to eighty stores in

[1] Prior to her employment as a registered pharmacist, Capaci was hired by K&B as a part time student pharmacist and received credit for this work in the Loyola School of Pharmacy where she was a student.

1979. The K&B organization was relatively small until 1971 when a period of rapid expansion began.

In 1973, the year Capaci filed her charge, the work force of K&B was largely female, but its managerial force was predominately male.[2] Until the time of her charge there existed basically two lines of progression to storewide management positions at K&B. One line was from a manager trainee position to relief manager and progressively to assistant manager and manager. The other line prior to 1968 was from pharmacist to assistant manager to manager. The position of chief pharmacist was created in 1967 and thereafter this line was principally from pharmacist to chief pharmacist, and few pharmacists were promoted to storewide management positions after that date. Capaci was never promoted to assistant manager or chief pharmacist during her 10-year period of employment with K&B.

THE EEOC CASE

The EEOC relies principally on its statistical evidence and the testimony of its expert Dr. Joseph L. Gastwirth to prove its allegation that K&B followed a policy and pattern of discrimination against females in its practice of excluding females from promotion to management positions after July 1965, the effective date of the Civil Rights Act of 1964. To buttress its statistical evidence it produced one present employee and four former employees who testified that their impression was that K&B did not treat males and females equally in appoint-

[2] According to the combined data of the 1973 EEO-1 forms for headquarters and stores, the sales workers were 92% female, office and clerical workers—87% female, and service workers—75% female, but of a total of 201 officials and managers, only 3, or 1.49%, were female.

ments to management positions, and it presented evidence of advertising practices of K&B to show that it preferred males over females in its management positions. The EEOC also urges the court to draw an unfavorable inference from K&B's failure to keep certain personnel records since the filing of the charge of discrimination in this case, allegedly in violation of the requirements of Title VII, § 709(c), and 29 C.F.R. 1602.14.

STATISTICAL EVIDENCE

The EEOC offered 79 statistical exhibits in three categories: (1) Referent Exhibits 1-26; (2) Manager Trainee Exhibits 1-17; and (3) Pharmacy Exhibits 1-36. The Referent Exhibits were for the most part presentations of data from the 1970 Census on the civilian labor force in Louisiana which Dr. Gastwirth considered relevant to the K&B managerial force. The Manager Trainee exhibits were directed to proof that K&B excluded females from the manager trainee position, and the Pharmacy Exhibits dealt with discrimination in the promotion of female pharmacists.

Dr. Gastwirth made a variety of comparisons of the K&B managerial positions in his statistical studies. He compared the proportion of males and females in K&B's managerial force at certain periods of time with the proportion of males and females in various segments of the civilian labor force in Louisiana in 1970. Theoretically in these comparisons he used the various labor force segments as labor force pools of potential applicants for managerial positions at K&B. For example, he tested the probability of observing 3 or fewer females out of 201 officials and managers, assuming they were selected like a random sample from various labor force manager groups in

Louisiana, all of which had been weighted according to the number of stores in the various labor markets served by K&B, and the lower bound of that weighting was used for the testing.[3] The manager groups used by Dr. Gastwirth for this test, designated by him as "Referents" and their respective fractions female are as follows:[4]

Referent	Fraction Female
All Managers	.1607
Retail Trade Managers	.1701
Retail General Merchandise Store Managers	.2364
Department and Sales Managers (Retail Trade)	.2207

He found the probability of 3 or fewer females occurring by chance was less than one in a billion as to each group which is statistically significant at the accepted .01 level of significance.[5]

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[3] The lower bound was derived by selecting the smallest fraction female among the weighted areas.

[4] Dr. Gastwirth also included the Civilian Labor Force for the State of Louisiana, having .3431 fraction female, as a referent group in the test, but he admitted in his testimony that it was not the most appropriate referent group, and he made no effort to sustain it as a source pool for K&B's managerial force.

[5] This test has value to illustrate the approach of Dr. Gastwirth in this case, but has little probative value on the issue of gender discrimination. The test was admitted by Dr. Gastwirth to have been done only as a preliminary matter, and to be less than definitive because the data used for the test from the 1973 EEO-1 report could not be regarded as reliable for his purposes and because the data included employment decisions made pre-Civil Rights Act. K&B brought out on cross-examination also that by this test he had compared managers,

Manager Trainees

The only objective qualification for the position of manager trainee at K&B is a high school education. The highest annual salary for the period 1966-1973 was $7,488.00, or more when overtime was involved. The EEOC relies on three approaches in its statistical proof as to the manager trainee to prove that K&B discriminated against females in its hiring for the manager trainee position. First, it compared the proportion of males and females hired directly by K&B as manager trainees from July 1965 to January 1, 1973 with what it considered to be the relevant civilian labor force data for that position. Second, it compared the proportion of males and females hired as manager trainees during the years 1976 and 1977 with the proportion of males and females who applied for the position during those years. Third, it compared the distribution of males and females hired directly by K&B as manager trainees during the period July 1965 through December 1977.

K&B hired directly, as distinguished from promotion from within the organization, 265 males and 0 females between July 1965 and January 1, 1973. To test the probability of this proportion having occurred by chance, Dr. Gastwirth compared it with data for several groups of managers in the civilian labor force in Louisiana derived by weighting the labor market areas served by K&B according to the number of stores in them. Those groups of managers

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(Footnote 5 continued)
assistant managers and chief pharmacists, all of whom are promoted exclusively from *within*, not with the internal work force, but with *external* groups.

and the respective fractions female are as follows:[6]

Referent	Fraction Female
Managers Earning Less Than $7,000 (in 1969)	.3387[7]
Experienced Wholesale and Retail Managers Earning Less than $7,000 (in 1969)	.2766
General Merchandise Retail Store Managers	.244
Department and Sales Managers (Retail Trade)	.2809

He was testing the probability that K&B would hire 265 males and 0 females into its manager trainee position between July 1965 and January 1, 1973, if persons hired for the position were selected like a random sample from each of the above groups. His test results showed that the probability that 0 females out of 265 hired would occur by chance as to each group was less than one in a billion.[8]

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[6] The Civilian Labor Force and All Managers group was included in this test. Dr. Gastwirth's discussion of the test shows that he did not consider that the manager trainee group at K&B should mirror the All Managers group in Louisiana, and he did not demonstrate how the entire civilian labor force was an appropriate group for comparison with the manager trainees.

[7] The $7,000.00 salary cutoff was chosen because Gastwirth did not consider, given the salary at K&B, that anyone making more than $7,000.00 would apply for the manager trainee job.

[8] Both sides are in agreement generally that in a case such as this the hypothesis that a difference in proportions male and female is the result of chance should be rejected in favor of the conclusion that the difference occurred for other reasons when the test results indicate that the probability of the difference occurring by chance is one in a hundred or less—.01 level of significance.

Applicant flow data for the manager trainee position was available only for the years 1976 and 1977. The data included both outside applicants and those applying from within K&B, and showed the number of hires and the number of applicants for each year and for each sex, and the totals for both years were calculated.

Males

	Applicants	Hires	Percent Hired
1976	100	64	64.0
1977	296	84	29.38
Total	396	148	37.37

Females

	Applicants	Hires	Percent Hired
1976	12	5	41.66
1977	82	10	12.20
Total	94	15	15.96

A chi-square test showed that the difference between the percentage of male applicants hired (37.37) compared to the percentage of female applicants hired (15.96) for the position of manager trainee during 1976 and 1977 is statistically significant. The probability of this difference occurring by chance is one in a thousand according to the test.

During the period July 1965-December 1977, 633 males were appointed as manager trainee, and 20 females were so appointed. 97.95 percent of the males were hired directly and 30 percent of the females were hired directly. The remaining percent for each sex were promoted from within, of course. The remaining 70 percent female were all promoted from the position of cashier. A chi-square test, which tested whether the distribution of male and female

outside hires was equal, showed that the difference in the percentage of females (30%) and males (97.95%) is statistically significant. This difference has a probability of less than one in a thousand of occurring by chance.

K&B seeks first to discredit the statistical evidence of the EEOC. It urges the court to reject the EEOC statistical case because its expert, Dr. Joseph L. Gastwirth, was a theoretical statistician with little qualification for the problems of applied statistics in this case. It emphasizes Dr. Gastwirth's complicated responses to some of the questioning, the great difficulty he had in explaining some of his statistical exhibits, his admitted failure to familiarize himself with the K&B operation, and his small expertise as a labor economist. These factors make the burden of the court more onerous, but they are not cause of themselves to reject his testimony and his exhibits as having no weight at all.

K&B also urges that much of the evidence of the EEOC has no relevance to the issue of discrimination in this case. The statistical proof of the EEOC as to the manager trainee position deals largely with manager trainee hires from *outside* the K&B work force. K&B contends that these statistics are largely irrelevant because they ignore the established practice of K&B to look first to its existing work force for new manager trainee candidates before going outside. The EEOC statistics would be irrelevant if the EEOC had combined those hired from outside and those promoted from within and compared the total to groups in the Louisiana labor force on the theory that those groups were the labor source pools. In the recent case, *Johnson v. Uncle Ben's, Inc.*, 628 F.2d 419 (1980), the Fifth Circuit Court of Appeals held that the two issues of access to jobs in an employer's work force—promotion and lateral

hiring—should be kept separate in scrutinizing statistical analyses.

The real issue here is whether the statistics are deficient because no statistical studies were made comparing those promoted from within to manager trainee with K&B's internal work force. The Fifth Circuit held in *James v. Stockham Valves & Fittings Co.*, 559 F.2d 310 (1972), that for jobs filled by promotion, the relevant comparison is the company's internal work force. According to the Fifth Circuit in *Uncle Ben's, supra*, this statistical lack is not necessarily fatal:

> The difficulty is that most cases fall between these extremes of exclusive promotion and of exclusive non-promotion [hires from outside]. As a general matter, however, cases are dealt with in terms of the extreme to which they most closely accord.***628 F.2d at 425.

The extreme to which this case most closely accords is that the manager trainee position was filled by outside hires. When questioned about his failure to make studies of those promoted from within, Dr. Gastwirth testified that approximately 95% of those appointed to the manager trainee position were hired from outside the K&B work force.

The groups selected by Dr. Gastwirth based on Labor Market data from the 1970 Census are seriously questioned by K&B as not being appropriate for comparison to the manager trainee position or any management position at K&B.[9] Dr. Gastwirth was equivocal at

[9] Generally, it is recognized that comparative labor force data or comparative applicant flow data can be used. The choice depends on

some points in his testimony as to whether his groups were source pools for actual applicants or comparison groups for the manager trainee position,[10] but the explanatory language in his exhibits and his testimony as a whole indicate that in his studies he regarded the groups as source pools. K&B argues that these groups are not sufficiently representative of its source of actual applicants to have any relevance to its hiring practices. It accuses the EEOC of using any available data without regard to its relevance to the K&B work force.

Dr. Gastwirth admitted that his groups include part time employees and the self employed, some of whom are not potential applicants for the manager trainee position, and that no data was available to him to make these refinements. The potential applicant pool will be further reduced in proportion female, according to K&B, by the lack of interest of females in applying for a job having a manager trainee schedule and work requirements. Dr. Gastwirth had not informed himself as to the nature of the job from these particular aspects of it.

The job requires the manager trainee to unload supply trucks, to put up stock, straighten up the store, and the

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(Footnote 9 continued)
the surrounding circumstances as they affect relevance and reliability. *Hazelwood School District v. United States*, 433 U.S. 299, 97 S.Ct. 2736, 53 L.Ed.2d 768 (1977); *Dothard v. Rawlinson*, 433 U.S. 321, 97 S.Ct. 2720, 53 L.Ed.2d 786 (1977). The most appropriate comparison would be the actual hires to the applicants. Since applicant flow information was lacking in this case, except for the years 1976-1977, it was acceptable for the EEOC to look for any relevant labor force data. See Baldus-Cole, Statistical Proof of Discrimination, p. 103 (1980).

[10] A source group is a pool of all who are potentially qualified and available for the job under study. A comparison group is a similar work force or job in a similar industry which, because of its similarity, can be reliably compared to the work force under study.

work schedule includes night work, week end and holiday work. Dr. Charles J. Cranny, testifying for K&B as a labor economist with some expertise in industrial organizational psychology (the psychology of people at work), expressed the opinion that the requirements of the job, including the schedule, would substantially retard females from applying as compared to males. He offered no studies to support his opinion, and admitted that no data was available, but defended his opinion as being based on a reasonable explanation for the reason that the K&B manager trainee force had a smaller proportion female than the labor market groups.

To lend practical support to Dr. Cranny's opinion K&B offered two female witnesses who resigned from the manager trainee position because the schedule was too rigorous. There was also testimony from a female employee who had refused to enter the management program when approached by management, and from another who had made known to management that she was not interested because of the heavy manual labor involved and the week end work. There was additional testimony from males in management naming female employees who were sought out for the manager trainee program and who refused to enter it.

Dr. Gastwirth specifically questioned Dr. Cranny's opinion as to the effect of night work in reducing the number of potential female applicants. He admitted generally, however, that the data from the 1970 Census applicable to the managerial groups used as a basis for his studies was aggregated, that is, it needed refinement that he could not make, so that none of these groups would be the most appropriate to compare with any management job at K&B.

K&B accuses Dr. Gastwirth of using an inappropriate statistical approach in his testing of the data for manager trainee applicants and hires for the years 1976-77. Whereas Dr. Gastwirth combined all applicants and all hires throughout the K&B chain for those two years, K&B contends that the data should have been broken down and tested as to each locality where applications were received. The justification for this is that the applicants for a position open at one location, for example, Alexandria, Louisiana, cannot logically be regarded as applicants for a position at another location, for example, Lake Charles, Louisiana, so that the data should not be combined. Dr. Cranny tested the data as to each location and found a result of statistical significance at only one—New Orleans.[11]

For the sake of argument, Dr. Cranny used five of Dr. Gastwirth's groups taken from the 1970 Census data (and added two groups from EEO-1 summary reports for the State of Louisiana) and compared them with the manager trainee hire and promotion data broken down by year for the period July 1965 through 1978 to show that there was no pattern of disparate treatment of females at K&B.

The Groups:

1. Civilian Labor Force (Percent Female 36.76)

[11] Dr. Cranny's approach reduced the possibility of the test results showing a non-chance reason for the difference in proportion male and female hires because he reduced the totals used by Dr. Gastwirth to samples of small size. Dr. Cranny was aware that it is difficult to get statistically significant results with small samples. It has been recognized that statistical evidence based on small samples has a limited value in employment discrimination cases to prove disparate treatment of a minority group. *Hornick v. Duryea*, 507 F.Supp. 1091 (M.D.Pa.1980) and cases cited therein; *see Thompson v. Leland Police Department*, 633 F.2d 1111 (5th Cir. 1980).

2. All Managers (Percent Female 16.24)

3. All Retail Trade Managers (Percent Female 18.16)

4. All General Merchandise Retail Store Managers (Percent Female 24.40)

5. Department and Sales Managers—Retail Trade (Percent Female 28.09)

6. EEO-1 Report Summary by State: Officials and Managers, New Orleans SMSA (Percent Female 13.2)

7. EEO-1 Report Summary by State: Officials and Managers, Louisiana (Percent Female 11.4)

(He considered the EEO-1 groups less inappropriate than Dr. Gastwirth's groups for comparison purposes.)

The Hire and Promotion Data:

7-12/65	1966	1967	1968	1969	1970	1971	1972	1973
M 12	20	28	31	32	42	47	54	71
F 0	0	0	0	0	0	0	0	0

	1974	1975	1976	1977	1978
M	93	55	67	85	1
F	1	3	5	8	11

Dr. Cranny reported his test results at .01 and .05 probability levels and N.S. (not significant). He found no pattern of disparate treatment over these years at the .01 level even after correcting several errors in his calculations which were called to his attention by the EEOC.[12]

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[12] Dr. Cranny reported the results of his statistical tests in the

Dr. Gastwirth objected to Dr. Cranny's approach of testing for each year as being inefficient because it resulted in reducing the sample size, thus making more difficult a rejection of the null hypothesis that males and females were appointed in equal proportions. He was further of the opinion that it was not proper to separate the data by year for the period that the percentages were the same (1965-

(Footnote 12 continued)
following chart:

"REFERENT GROUPS"

YEARS	1	2	3	4	5	6	7
7-12-1965	.01* ~~.05~~	N.S.	N.S.	N.S.	.05* ~~N.S.~~	N.S.	N.S.
1966	.01	N.S.	.05* ~~N.S.~~	.05	.01	N.S.	N.S.
1967	.01	.05	.01* ~~.05~~	.01	.01	.05* ~~N.S.~~	N.S.
1968	.01	.05	.01	.01	.01	.05* ~~N.S.~~	.05* ~~N.S.~~
1969	.01	.05	.01	.01	.01	.05* ~~N.S.~~	.05* ~~N.S.~~
1970	.01	.01	.01	.01	.01	.01* ~~.05~~	.01* ~~.05~~
1971	.01	.01	.01	.01	.01	.05	.05
1972	.01	.01	.01	.01	.01	.01	.01
1973	.01	.01	.01	.01	.01	.01	.01
1974	.01	.01* ~~.05~~	.01	.01	.01	.01* ~~N.S.~~	.01* ~~N.S.~~
1975	.01	.05	.01	.01	.01	N.S.	N.S.
1976	.01	.05	.05	.01	.01	N.S.	N.S.
1977	.01	N.S.	.05	.01	.01	N.S.	N.S.
1978	N.S.	N.S.	N.S.	N.S.	N.S.	N.S.	N.S.

* Corrections made by Dr. Cranny.

1972, 100% males and 0% females were appointed) because similar data should be pooled for testing. He did not demonstrate, however, how the lack of pattern would have changed if Dr. Cranny had pooled the data for those years and separated it only for the period 1973-1978. Dr. Gastwirth also suggested that a pattern may be hidden because the probabilities were reported at the .01 and .05 levels rather than the exact probabilities.

To the serious and substantial objections K&B has made to the labor force groups which the EEOC used for comparison with the manager trainee group, and to the techniques the EEOC used in presenting its statistical evidence, the EEOC has made no argument to sustain its groups as relevant either as source groups or as comparison groups, or to sustain its questioned techniques.

Statistics can serve as a useful tool in pattern and practice suits in the determination of whether defendants have engaged in employment discrimination. *International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977). In this case, for example, if appropriate data has been collected and properly interpreted, statistics can determine whether disparities in the form of underrepresentation of females in the K&B managerial work force can be attributed solely to chance factors. Where gross statistical disparities can be shown, statistics alone may in a proper case constitute prima facie proof of a pattern or practice of discrimination. *Hazelwood School District v. United States, supra* note 9; *Equal Employment Opportunity Commission v. Datapoint Corporation,* 570 F.2d 1264 (5th Cir. 1978); *Davis v. Califano,* 613 F.2d 957 (D.C.Cir.1979); *Markey v. Tenneco Oil Company,* 635 F.2d 497 (5th Cir. 1981); *Little v. Master-Bilt Products, Inc.,* 506 F.Supp. 319 (N.D.Miss.W.D.1980). To

have such force the statistics must be relevant, material and meaningful. *Equal Employment Opportunity Commission v. Datapoint Corporation, supra; Johnson v. Uncle Ben's, supra.*

To be relevant as source groups for comparison with K&B's manager trainee force, the labor force groups used by the EEOC must be the proper population of potential applicants for the manager trainee job. All of the basic referent groups are admittedly aggregated, that is, they contain persons who are not truly potential applicants. Furthermore, all of the groups are aggregated because of the female self-selection factor. Dr. Cranny's opinion on this factor as affecting the potential applicant pool has a reasonable basis that would remove it from the realm of mere surmise or conjecture. The data was aggregated, therefore, and there is no certainty as to how much it was aggregated. Dr. Gastwirth admitted that figures were not available for him to refine the data.[13]

As mentioned earlier, Dr. Gastwirth in his testimony at times appeared to be regarding the manager groups taken from census data as comparison groups, but he did not show how they could properly be considered as comparison groups, and the EEOC in its arguments does not indicate that it proposes any of them as comparison groups. All of the groups included data on businesses not comparable to the K&B operation, such as boutiques and

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[13] Dr. Gastwirth's testimony leaves no doubt that he had the feeling as a statistician that "out there" somewhere was an appropriate group that, when compared to K&B's manager trainee force, would show discrimination against females. He calculated that any group having more than two percent females would cause a rejection of the hypothesis that 265 males and 0 females were chosen like a random sample, and the inferencce that the under representation of females occurred by chance would also be rejected.

dress shops. Dr. Cranny indicated that a comparable management level job in other chain pharmacies, or even in grocery chains, would provide an appropriate comparison group, but no data is available for either.

The EEOC does not defend its statistical approach in testing the data for manager trainee applicants and hires for the years 1976-77 against the charge of K&B that the data combining all applicants and hires for the two years should have been broken down by locality. There was no testimony from Dr. Gastwirth explaining how his approach was preferable to Dr. Cranny's.

The value of testing the distribution of the percentages of male and female outside hires for the manager trainee position, as compared to the percentages of males and females promoted from within, for showing a pattern and practice of discrimination was never explained in testimony or otherwise by the EEOC. Statistics should be meaningful, and not fashioned to obtain a desired conclusion. *Equal Employment Opportunity Commission v. Datapoint Corporation, supra.*

Pharmacists

Statistically, the EEOC analyzed its allegation of discriminatory promotion practices from the standpoint of the pharmacist position. The purpose of the analysis was to test the validity of the hypothesis that male pharmacists and female pharmacists had an equal chance of being promoted to a management position at K&B. The promotion practices were surveyed from various viewpoints and for several periods.

First, Dr. Gastwirth examined how female pharmacists fared in promotion to management positions prior to the effective date of the Civil Rights Act, July 1, 1965. Second, he examined the relative length of service between male and female pharmacists prior to promotion. Third, he compared the proportion of male and female pharmacists promoted during certain periods with the proportion of male and female pharmacists hired during the period. Fourth, he examined as of January 1973 (1) the distribution of jobs according to the level of desirability of all employees who at some stage of their employment had been pharmacists, and (2) the proportion of male and female pharmacists at K&B in managerial and staff positions in comparison to the proportion of males and females in those positions in community pharmacies, hospitals and nursing homes in Louisiana during 1973.

Dr. Gastwirth tested the probability of equal promotion of male and female pharmacists in the K&B work force as of July 1965 who were appointed before Capaci was appointed pharmacist—those appointed between June 1949[14] and January 1963—and who were promoted prior to July 1, 1965, the effective date of the Civil Rights Act. His data showed that out of 29 males and 6 females, 65.5 percent (19) of the males were promoted and 0 females. The Fisher exact test gave this comparative rate of promotion a probability of .0049, or less than one-half of one percent,—statistically significant.

Dr. Gastwirth extended the appointment period—June 1949 to July 1, 1965—and the data changed. Out of 39 males and 13 females, 51.28 percent (20) of the males

[14] This date was selected as a starting date because that was the earliest date of appointment of a female as a pharmacist who was still employed in July 1965.

were promoted and 0 females. The Fisher exact test showed this difference to be statistically significant with a probability of less than one in a thousand.

Using the Wilcoxin-Mann-Whitney test Dr. Gastwirth determined that there was a statistically significant difference for males and females in the time from appointment as pharmacist to promotion (either to chief pharmacist or a store-wide management position) of the 41 pharmacists promoted during the period July 1, 1965 through January 1973. The two females who were promoted had service times of 229 and 97 months from appointment to promotion. These were the largest service time (rank 41) and the third largest (rank 39). The probability of this extreme rank order for the females occurring by chance was less than one-half of one percent—statistically significant.

When the test was limited to data on time from hire to promotion to chief pharmacist (females ranked 25 and 24 out of 26 rankings) the results showed that the probability of observing this difference between males and females in time to promotion was .0123, and statistically significant in the opinion of Dr. Gastwirth.

The proportion of male and female pharmacists who had been hired in the period from July 1, 1965 to January 1, 1973 and who had received a promotion during that period, was compared. Twenty of the 196 pharmacists hired during that period were female, but of the 28 promoted during that period 0 were female. Using the Fisher exact test the probability of observing this difference is .049.

A statistical comparison was made of the proportion

of male and female pharmacists hired between June 1963, the date plaintiff was hired and January 1, 1973, just prior to the charge, who were promoted to chief pharmacist or store-wide management position during that period. Out of 220 hired (191 males, 29 females) 34 males (17.8%) and 0 females were promoted. The probability of observing so few females promoted is less than .0082, statistically significant at the .01 level of significance.

How female pharmacists fared in promotion to assistant manager was tested. From the inception of the Civil Rights Act, July 1, 1965, to December 31, 1977, 273 males were hired, 24 of whom were promoted to assistant manager. Seventy-nine females were hired and none was promoted. This difference tested at a probability of .0022, which is statistically significant.

The 145 positions held as of January 1973 by employees who were pharmacists at some stage of their employment with K&B were examined on the basis of their distribution among males and females according to their wage level of desirability (top level—supervisor, manager, buyer; middle level—assistant manager, chief pharmacist; lower level—pharmacist). Twenty-six males and 0 females held top level positions, twenty-four males and one female, middle level, and eighty-three males and 11 females, lower level. The Mann-Whitney-Wilcoxin test rejected the hypothesis that males and females had the same distribution of positions at the .05 level of statistical significance, but not at the .01 level.

A comparison was made of the managerial and staff positions held by male and female employees as pharmacists at K&B in January 1973 with those positions held by active resident pharmacists employed in community

pharmacies, hospitals and nursing homes in Louisiana during 1973. At K&B 1 of 51 managers was female, and 11 of 94 staff pharmacists were female. In the community pharmacies, hospitals and nursing homes 30 of 430 managers were female and 96 of 519 staff employees were female. Dr. Gastwirth combined the probability of observing fewer females in manager and staff positions at K&B than in the other places of employment, and the overall probability was .007, statistically significant at the .01 level.

K&B charges that only by ignoring relevant facts and juggling dates was the EEOC able to present statistical evidence against it in its promotion of pharmacists. Under particular attack is the testing of data for those pharmacists *hired* between July 1, 1965 and January 1, 1973 and promoted during the same period. The data was to the effect that 0 females out of 20 were promoted, but 28 out of 176 males were promoted. By this juggling two females who were promoted to the chief pharmacist position in 1968 were eliminated because both were hired prior to 1965. These two were among the first six promoted after the position of chief pharmacist was created. Females were actually over represented in this instance. Furthermore, in its assistant manager test the EEOC tested data through 1977, but none of its tests were structured so that three females promoted to chief pharmacist in 1973 were included in the data.

K&B objects to the statistical evidence relating to time before the Civil Rights Act because K&B is not liable under the act for preact conduct. Preact conduct can be useful, however, in an examination of pattern and practice if the postact conduct is shown to be a continuation of an employer's preact discriminatory practices.

Those studies comparing the K&B pharmacists to those in community pharmacies, hospitals and nursing homes are questioned as not being relevant because hospitals and nursing homes inflate the percentage female since those businesses traditionally attract a greater proportion female and therefore are not similar enough to community chain pharmacies to be comparable for statistical analysis. When the data on hospitals and nursing homes were eliminated, the result was not statistically significant.

Additionally, Dr. Cranny did not agree with Dr. Gastwirth's statistical method of combining the probability of the managerial group and the staff pharmacist group and multiplying the two to obtain the overall probability, which was significant at the .01 level. Dr. Cranny admitted that it would be statistically correct to multiply the results for the two groups if they were independent of each other, and he was not able to explain clearly that they were not independent. Dr. Gastwirth's justification for considering them independent was that one group was not taken from the other, that is, managers and staff pharmacists were not taken from the same pool, and Dr. Cranny was not able to demonstrate a basis for considering them dependent groups.

K&B argues that Dr. Gastwirth shifted his choice of level of significance to fit the EEOC position. Dr. Gastwirth agreed that to avoid the possibility of error in assuming that a nonchance reason accounted for the difference in the data on promotion of males and females, the .01 level of significance was proper. K&B points out that he departed from this opinion in several of his tests and found statistical significance even when the test results showed a probability above the .01 level either by choosing the .05 level or by using such terms as "marginally significant".

This occurred in his test of job level distribution as of January 1973 of all employees who had been pharmacists at some time in their employment at K&B. This test was also subject to the single date testing objection, and the further objection that the data included preact employment decisions.

K&B offered its own statistical evidence for the purpose of showing that statistical evidence does not support an inference of discrimination against females in its promotion of pharmacists.[15]

Dr. Cranny performed a median test to test whether the median time for promotion to chief pharmacist for males and females differs in a statistically significant way. The results showed there was no significant difference in the distribution of time to promotion in months during the periods 1965-73, 1973-78, and the combined period 1965-1978 (chi-square tests for the two periods and combined were, respectively, 1.05, 1.15 and .05)[16] By utilizing this

[15] One of K&B's statistical tests corrected data produced by the EEOC relating to the proportion of male and female student-graduate pharmacist hired from July 1965 through December 31, 1977, and tested the corrected data with a non-significant result. The EEOC does not mention student-graduate pharmacists in its post-trial brief and apparently does not rely on its student graduate evidence.

[16]

Months	1965-1973 Female	1965-1973 Male	1974-1978 Female	1974-1978 Male	Combined 1965-1978 Female	Combined 1965-1978 Male
*Over 200	2	1	0	3	2	4
190-199	0	1	0	0	0	1
180-189	0	0	0	0	0	0
170-179	0	0	0	1	0	1
160-169	0	0	0	0	0	0
150-159	0	0	0	0	0	0
140-149	0	0	0	0	0	0
130-139	0	0	0	0	0	0

median test Dr. Cranny explained that he was looking at the typical time to promotion, whereas Dr. Gastwirth, by using the Wilcoxin-Mann-Whitney test to test the difference in the length of time to promotion, was testing the similarity of the shapes of the two distributions—male and female—, and statistical significance will be obtained if the two distributions do not match, regardless of the manner one distribution does not match the other.

Dr. Cranny questioned the validity of Dr. Gastwirth's reporting of mean or average length of time to promotion for males and females (163 months for females, 29.10 for males), while using the Wilcoxin test, as an inconsistency, because the Wilcoxin test makes no assumption about the symmetry of the distribution, but the average

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(Footnote 16 continued)

[16]

Months	1965-1973 Female	1965-1973 Male	1974-1978 Female	1974-1978 Male	Combined 1965-1978 Female	Combined 1965-1978 Male
120-129	0	1	0	1	0	2
110-119	0	0	0	0	0	0
100-109	0	0	0	1	0	1
90- 99	0	0	0	1	0	1
80- 89	0	0	0	0	0	0
70- 79	1	0	0	2	1	2
60- 69	0	4	0	4	0	8
50- 59	0	1	0	2	0	3
40- 49	0	2	0	4	0	6
30- 39	1	4	0	3	1	7
20- 29	1	8	0	5	1	13
10- 19	0	8	2	8	2	16
1- 9	0	2	1	5	1	7
Totals:	5	32	3	40	8	72
Mdn:	29		31		27	

*Over 200 months:
F: 229 & 453 months
M: 280, 285, 483 & 489 months

assumes a symmetrical distribution. Dr. Gastwirth denied that reporting the average time to promotion for male and female along with the results of the Wilcoxin test is misleading, but downgraded the average in importance as being "just a summary statistic."

Dr. Gastwirth agreed that the median test performed by Dr. Cranny would not result in statistical significance, but he considered it inappropriate as not being a statistical test powerful enough to test the hypothesis of equal distribution of time to promotion between males and females.

K&B introduced the results of several statistical tests performed by it to show that raw data, produced by Dr. Gastwirth at his pre-trial deposition, when tested would produce nonsignificant results.

K&B tested the comparison of males and females promoted to chief pharmacist from July 1965 through December 1973 with the total number of each sex employed by it as pharmacists during that period and the results were not significant. A total of 215 males and 33 females were in the K&B pharmacy work force during this period, and of these, 32 males and 5 females were promoted to chief pharmacist. Dr. Cranny made a chi-square test of the proportions male and female promoted and the results were not significant—.05 level. The test differs from the EEOC evidence testing promotions to chief pharmacist in that it has no cut-off hire date which would eliminate the females promoted during the period, and the test period extends to the end of 1973 rather than January 1973, the date of the charge. This extension of the test period allowed the three females promoted after April 1973 to be included in the data count.

Raw data provided by Dr. Gastwirth before trial, but not tested, also prompted K&B to test a comparison of male and female promotions to chief pharmacist of those who were hired after the plaintiff Capaci (i.e. after June 1963) and who were pharmacists before January 1973. Twenty of 179 males hired were promoted compared to 0 females out of 29 hired. Dr. Cranny utilized the chi-square test and the result, as corrected at trial, was 2.41, not significant. The EEOC challenged the chi-square test as the proper one because it is not precise enough in this instance where the testing would show that the number of females expected to be promoted out of 29 is so few—2.79, or about three. The challenge was based on the school of thought that the chi-square test should not be used when the expected value is less than five. Dr. Gastwirth preferred the Fisher Exact test here, and using a quick approximation of it, he concluded that females had a lower promotion rate than males, but he admitted that Dr. Cranny's chi-square result was not a "terribly bad" approximation.

Dr. Cranny defended his use of the chi-square test, and was of the opinion that the chi-square test should be rejected for the more precise Fisher Exact test only when the third or fourth decimal place is needed, and in testing for two decimal places, .01 or .05, the chi-square test is an adequate approximation. Dr. Cranny further explained that the actual number of females promoted will inevitably be fewer than the expected number shown in the testing when the male group from which the selection is made is much larger than the female group and the selection ratio is small. This is so because the larger group the more qualified persons will be found in it, and therefore the chance of the selection being made from that group, rather than the smaller one, increases.

For separate periods—July 1, 1965 through January 1, 1973 and July 1, 1965 through December 31, 1973—Dr. Cranny tested the comparison between proportions of male and female pharmacists promoted to a store-wide management position. In the first period, according to Dr. Gastwirth's data, of 215 males at K&B during the period, 18 were promoted, and of 33 females, 0 were promoted. In the second period, of 242 males, 18 were promoted, and of 39 females, 0 was promoted. The results of the chi-square tests were not significant at levels 1.87 and 1.98 respectively.

Since the chief pharmacists and store-wide managers who are pharmacists are drawn from the same pool—the pharmacy work force—Dr. Gastwirth disagreed with the technique of analyzing the promotion to these two categories separately as Dr. Cranny did. He disagreed because once a pharmacist is chosen from the pool for promotion to chief pharmacist, that same pool can no longer serve as the pool for promotion to assistant manager. This is so because the pharmacist promoted to chief pharmacist is no longer available for promotion to a store-wide management position—assistant manager. That promoted pharmacist is removed from the pool. He disapproved therefore of comparing separately one promotion category—store-wide management position—with the total pharmacy pool.

The proper analysis in his opinion, where two categories are promoted from the same pool, is a two-step analysis. The first step is to look at those pharmacists who are not promoted and those promoted, and the second step is to look at those who were promoted to ascertain the category to which they were assigned. By this analysis the total number of pharmacists is classified into three

groups—those not promoted, those promoted to chief pharmacist, and those promoted to assistant manager. The first question to be answered is, were the promotion rates of males and females equal, and the second is, of those promoted, were the assignment rates equal? The purpose of this analysis is to examine the equality of distribution of assignment of males and females to each of the two categories, that is, to determine if the distributions are the same—equal percentage male and female promoted to chief pharmacist, equal percentage male and female promoted to store-wide management.

Dr. Gastwirth demonstrated his analysis by the example of a total of 100, 70 not promoted, 15 promoted to chief pharmacist, 15 promoted to assistant manager. If 15 of the males were promoted to assistant manager, 15 of the females would be expected to be promoted to assistant manager. If 15 males were promoted to chief pharmacist, the expectation female would be 15.

He represented that the mathematical equivalent of this analysis was made by him when he combined those pharmacists promoted to chief pharmacist and store-wide management position between June 1963 and January 1973, who were hired during the same period, to compare statistically the proportion of males and females promoted. His explanation of this test on his direct examination and the explanation of the test in the exhibit introduced to demonstrate the data and test results do not reveal any such technique was followed. According to him, the second step of the analysis was eliminated as not being essential when his data showed 0 females were promoted, thus he had no distribution of males and females to compare in the chief pharmacist and store-wide management categories. He concerned himself only with the first question,

therefore,—were the promotion rates of male and female equal?

His criticism of Dr. Cranny's technique of testing separately the two categories did not include his own application of his preferred technique to data used by Dr. Cranny to show the statistical result.[17]

Dr. Gastwirth further objected to separating the promotion categories, chief pharmacist and store-wide management for testing because separating them reduced the sample size and made more difficult any meaningful statistical testing of the issue of whether the female promotion rate was equal to the male.[18]

To show generally that K&B did not discriminate against females in its pharmacy work force, Dr. Cranny compared the proportion female from July 1, 1965 through January 31, 1973 (of 248 pharmacists, .133% were female) with three labor force groups:

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[17] Some apparent inconsistency in the data produced by Dr. Gastwirth before trial and used by Dr. Cranny in his tests would have had to be resolved for such testing. Neither side mentioned these discrepancies at trial or in post-trial brief. In two of Dr. Cranny's tests—one for chief pharmacist promotion, and one for assistant manager promotion he used the period July 1965 through December 1973 and the total number of pharmacists in each test was the number of each sex working for K&B as pharmacists during the period. For the chief pharmacist test the total is shown to be 215 male, 33 female; for the store-wide management test the total is shown to be 242 male, 39 female. Another possible complication of the data problem is the total shown for the shorter period in another of Dr. Cranny's tests—July, 1965 through January 1, 1973—215 male, 33 female, identical numbers for the totals in the chief pharmacist test.

[18] As pointed out previously in a small sample size, a large discrepancy in the comparison groups may not produce a result of statistical significance.

1. Proportion female (.11) of active resident pharmacists in Louisiana;

2. Proportion female (.09) of pharmacists practicing in community chain pharmacies in Louisiana.[19]

3. Proportion female (.1441), according to the 1970 census of employed pharmacists in the civilian labor force in markets in Louisiana served by the defendant.[20]

K&B has a higher proportion female than the first two groups, and the result of a statistical test comparing the proportion female at K&B with the third group is not significant. The EEOC has not questioned these comparisons.

The EEOC statistical tests of the data relating to K&B's promotion of pharmacists before the passage of the Civil Rights Act are reliable tests to raise an inference of pattern and practice discrimination against female pharmacists. Less reliable are the tests relating to pharmacists' promotions after the passage of the Act. Particularly suspect is the EEOC's juggling of dates to eliminate from the data in some of its tests female pharmacists who were promoted after the effective date of the Act and before the date of the filing of the Capaci charge, so that 0 females was the consistent data tested.

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[19] The information for these two groups is from Health, Education and Welfare, Division of Manpower Intelligence Report "Registered Pharmacists in Louisiana 1973). This report did not provide comparative data on male and female pharmacists in managerial positions.

[20] This group was taken by Dr. Cranny from one of the exhibits prepared by Dr. Gastwirth in which he weighted the census data in proportion to the number of stores located in a market area.

All actual promotions of pharmacists after the Civil Rights Act, particularly those for the period 1965-73, were relevant to the issue of discrimination in this case. Dr. Gastwirth was not able to explain to the court the relevancy of the hire date to this issue in several of his studies in which the hire date had the effect of eliminating data on female pharmacists who had been promoted after the Act.

The inclusion of pharmacists in hospitals and nursing homes with the data on community pharmacies makes this group less appropriate as a comparison group to the K&B operation than a group limited to chain pharmacies. Furthermore, comparisons of these groups have a limited value because the tests involve only the year 1973.

NONSTATISTICAL EVIDENCE

To enhance its statistical proof the EEOC relies on the testimony of several females, some of whom applied for management positions at K&B and were allegedly rejected because of their gender, and some of whom were allegedly discouraged from seeking management positions.

Marsha Lee Abrams applied for a manager trainee job in Baton Rouge in September 1977.[21] She was never interviewed. Her education—she had worked towards her doctorate at Columbia University—and her extensive work experience in the publishing business clearly supports K&B's contention that she was in fact over qualified for the manager trainee job for which a high school education was the only qualification and which involved a substantial amount of manual labor. Two positions were open in Baton Rouge at the

[21] Although she testified that she would have considered employment in New Orleans also, there is no indication that she made this known to any K&B personnel.

time Abrams applied. One was filled by a male, and one was filled by a female salesperson, Madeline Hopwood, who was promoted to the manager trainee position. Furthermore, according to the applicant-hire data which is available in this case and which includes the period of Abrams application, of 11 female applicants in Baton Rouge, four were hired.

Patricia McAuley testified that she applied for a manager trainee job in June or July 1974 and was told by William Serda, K&B personnel director, that she was not qualified for the management program and that it was not then open for women. She had been hired as a drug clerk in 1971 and, after making two more applications to become a manager trainee, she was appointed to that position in January 1976.[22] The weight of her testimony in recalling that Serda remarked that the management program was not open to women is lessened by her further recall that he told her to try again, and by the fact that a female, Joyce Innerarity was at that time in the program, having been promoted from a salesperson to manager trainee in February 1974.

Viewing McAuley's testimony from the standpoint of her ultimate success in being accepted into the management program, it can be interpreted as evidence that, if a female wanted to be in management, and could convince the personnel director that she was qualified, being female would not exclude her.

Carol Baughman, the head cosmetician in the Bogalusa, Louisiana store is an employee allegedly discouraged from entering management. She made an application at the insistance of her male assistant manager, Mr. Sheler, for a

[22] She was later promoted to relief manager, but personal and emotional problems caused her work performance to deteriorate and she was separated from K&B in 1978.

relief manager opening in that store in 1976. She made the application on the last day K&B was receiving applications, and she heard the next day that a male had got the job.

A relief manager position became available again in August 1977. This time her manager Mr. Hopper asked her if she intended to apply again, and in response she asked Hopper if he thought she would make a good relief manager.[23] He told her he thought she would make a good one and she made the application.

On the last night that applications were being taken her assistant manager Mr. Sheler told her he thought she had the job if she wanted it, and asked her how much did she want the job. After some conversation she told Sheler she was withdrawing her application. According to her, she withdrew her application because she knew she was about to have surgery and she did not want to inconvenience the other managers because of it, although she did not disclose to Sheler any information about her impending surgery.

The EEOC was not making its point for calling this witness and the Court took over the interrogation to ask the witness to search her mind for anything discouraging said to her in the conversation. At this prodding she recalled that Mr. Sheler had told her that, although he was the one who had talked her into making her first application, she was a lady and this was not the kind of job he thought she could handle. The crucial point of whether this remark was made before she told him to withdraw her application or afterwards was not established by her testimony. She

[23] In her testimony she admitted to having a "sort of inferiority complex" and thinking she was not quite good enough.

testified that Mr. Sheler never suggested that she should withdraw her application, that its withdrawal was wholly voluntary, and that she believed she would have got the job if she had not withdrawn it. However, if the remark of Sheler was made before she told him to withdraw her application, it could be construed only as encouraging her to withdraw it. If his remark was made after the withdrawal, it could be construed as an effort to make her comfortable with her decision and to indicate that perhaps he had been wrong to encourage her to apply.

Linda McBride, a former employee of K&B from 1973 to 1976, serving first as cashier and then as drug clerk, and a former roommate of Patricia McAuley, felt that she had been discouraged from applying for a management position because her managers would not give her information as to what the qualifications were for manager and because her roommate Patricia McAuley had so much trouble entering management. She testified that she wanted to know if a high school diploma, or a college degree or managerial experience was required. When she inquired as to these possible qualifications of one relief manager, Robert Williams, he did not tell her the qualifications, but told her instead that she would not be able to unload stock trucks, catch shoplifters and do other heavy work. She recalled talking to her manager Tom Gereighty about the requirements, but she could not recall what he said to her. She admitted that she never asked her roommate what the qualifications were, and that she did not apply for a manager trainee job because she did not want to go through the "hassle" of proving herself to the company.

The testimony of Grace Taylor Miller, a pharmacist who commenced her employment with K&B in 1931 as a cashier, is relied upon by the EEOC to show that she

performed the duties of managers but was never *officially* promoted. The EEOC does not state the basis for its contention as to lack of official promotion. Miller's employment record which is not disputed, shows that she was promoted from pharmacist to assistant manager on November 11, 1955 and that she was promoted from pharmacist to chief pharmacists on July 1, 1968.[24] Miller did not clarify what she meant when she testified merely that she never received the official title.

The further contention is made by the EEOC that Miller was never treated as a manager because, whenever she attempted to discipline or correct the behavior of a male subordinate, she was not supported by her male superiors. Any of her testimony that supports this contention is not identified or discussed. She testified at length about an incident in 1978 near the end of her employment with K&B when she considered that a subordinate pharmacist was infringing upon her authority when he took over the ordering for the pharmacy department with an explanation that the store supervisor had so instructed him. By her own testimony she did not attempt to discipline him, but instead waited to discuss the matter with the store supervisor.

When her supervisor told her that the subordinate was in error as to the instruction, reminded her that she was supposed to be the chief pharmacist and suggested that under the circumstances it would be better for her to get out, she construed the suggestion as termination and she did not return to work. All efforts by the store operations manager, Walter Feltman, to convince her that she

[24] She was demoted from assistant manager to relief manager in 1961, and further demoted from relief manager to pharmacist in 1963.

had misconstrued the conversation and to get her to stay on were unsuccessful.

On an earlier occasion, when she considered that one of her subordinates was out of line, she left the store and went home. K&B transferred the subordinate to another store.

Her testimony as a whole does not show that she was not treated as a manager by K&B.

The charge that she did not receive the bonuses that other K&B managers were paid is not substantiated by any evidence other than her testimony that she did not receive bonuses. Chief pharmacists have never been included in the bonus program, and there is no evidence to show the policy as to bonuses when she was assistant manager in the 1950's.

K&B undertook to show affirmatively by nonstatistical evidence that it has never either before or after the Civil Rights Act, discriminated against females on the basis of their gender. Sidney J. Besthoff, III, president of K&B, joined the organization in 1949 when he finished college. His grandfather was one of the founders of the original predecessor organization and his father was an owner of this closely held company. He worked at a number of positions in the company including assistant manager in 1949 or 1950, personnel manager in the early 1950's, and later on store operations manager before he became president in 1965.

Besthoff regards himself as having been a leader in efforts to end racial discrimination. In the early 1960's K&B was the first local chain to integrate voluntarily its

food service facilities. As a result of this action Besthoff, as a representative of the chain drug industry, was invited to attend a conference at the White House while John F. Kennedy was President on the problem of racial discrimination in transportation and public accommodations. He supported the civil rights legislation which was later adopted.

Although the "early thrust" of K&B under Title VII of the Civil Rights Act was a program directed to end racial discrimination in employment, Besthoff testified that the company had no real need for a recruitment program for females in management because females had been in management for many years before the Civil Rights Act, and the need for recruitment of females in management arose only after the expansion program for the company began in the early 1970's.

From 1947 through May 1965 nine females were promoted to assistant manager.[25] Of these Genevieve Ronquette was further promoted to personnel director in 1950, then made personnel manager in 1959 and retired in 1969; Lillian Hennessey was further promoted to manager in 1954 and retired in 1973; Blanche Callihan was further promoted to manager, but had an accident which prevented her from assuming the promotion; and Grace Miller's progression has been set out at length heretofore. What is notable about this documentation is that it reveals an alternative route to the pharmacy route to management for females before July 1965. Only one pharmacist, Grace Miller, is among the nine females promoted to assistant manager, and the others were all salespersons.

[25] The promotions occurred in the following sequence: 1947-1; 1953-2; 1954-2; 1955-1; 1961-1; 1965-2.

These promotions were made at a time in the company's history when store-wide management positions became available usually only on retirement or death of a manager. The operation was small in comparison to the expanded operation after 1970 when the company grew from 24 stores to 82 stores at the time of trial, and before the expansion period the executive level personnel evaluated the employees from personal knowledge of their performance and their capabilities. The testimony of Genevieve Ronquette, Lillian Hennessey, Blanche Callihan and Inez Nungesser is to the effect that they had not been treated differently from males by K&B in promotion to management.

Inez Nungesser commenced her employment in 1927 as a salesperson in the drug department of a high volume store on Canal Street in New Orleans. In 1953 the male assistant manager at her store died. She asked for the job and got it without experiencing any difficulty. She never aspired to become manager, even though the male manager retired before her retirement in 1972, and her testimony left no doubt that her entire employment at K&B had been a pleasurable experience.

When the male manager left the store where Lillian Hennessey was assistant manager in 1954, she became the manager and remained the manager until her retirement in 1973.

Blanche Callihan was approached on two occasions to become an assistant manager, and refused both times, before she finally accepted in 1965 a third offer to her for this position. She never applied for promotion to management and, when she finally consented to take the assistant manager position, her initial acceptance was only on a trial

basis. She had the opinion that more women were not in management because they did not want the responsibility, and the fact that she was approached to be assistant manager rather than applying for a management position convinced her that women were not treated differently from men in promotion to management.

Genevieve Ronquette replaced a male when she was further promoted to personnel director in 1950 and she remained in management until her retirement in 1969.

Upon the effective date of the Civil Rights Act seven of the nine females still held management positions, but by the time Walter Feltman was hired as store operations manager in October 1966 two of them had retired and one had died leaving only four females in management at that time—Ronquette, Hennessey, Nungesser and Callihan. From that time until the Capaci charge was filed in 1973 five females were promoted to management, but none to store-wide positions. Three female salespersons were promoted to cosmetic supervisor, and two female pharmacists were promoted to chief pharmacist. There is also some evidence of isolated unsuccessful efforts about 1968 to recruit female employees into the manager trainee program, but no females entered that program until 1974.

William Serda became personnel director in March 1971, and at that time there were still only four females in management—one manager, one assistant manager, one chief pharmacist, one cosmetics supervisor. He realized that this situation made the company vulnerable to charges of violation of the federal law against discrimination, and for that reason and the additional reason that the company had an urgent need for manager trainees in the expansion program, which was within his area of

responsibility, he made the recommendation to his superior Walter Feltman in 1971 or 1972 that females be encouraged to apply for managerial positions. The recommendation for affirmative action was taken under advisement, but was ultimately approved.

The promotion record does not indicate that the implementation of Serda's recommendation was immediate, and the written affirmative action policy was not published until 1976. Besthoff agreed that the Capaci charge was the impetus for the implementation of Serda's affirmative action recommendation. Thereafter the promotion of females into management has continuously accelerated. Several of those who were promoted after Serda became personnel director made clear in their testimony that from their experience at K&B their impression was that gender was not a factor in the promotion process at K&B.

The Advertising Evidence

To further bolster its statistical evidence the EEOC relies on K&B's manner of advertising for applicants for job vacancies during the period 1965-1971 as reflecting its policy of excluding females from managerial positions, and more particularly its policy of limiting the manager trainee positions to males. The EEOC researched the "Help Wanted" ads in the Sunday edition of The Times-Picayune, a New Orleans, Louisiana newspaper, from July 1965-July 1974, in the Morning Advocate, a Baton Rouge, Louisiana newspaper, at various times from August 1968-November 1974, in the Houma, Louisiana newspaper from October 1968-June 1975, and in the Lake Charles, Louisiana newspaper in December 1971 and January 1972. From this research it introduced 36 ads placed by K&B in the Times-Picayune from August 15, 1965-January 10, 1971 and six

ads placed in the Morning Advocate in August and September 1968. To buttress its policy manifestation argument it contends that these ads violated section 704(b) of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-3(b) by indicating a preference for males in the manager trainee and certain other ads, and by indicating a preference for females in the cashier, counter personnel and salesperson ads.[26]

The Times-Picayune had columns designated "Help Wanted—Male", "Help-Wanted—Female", and "Help Wanted—Male or Female" which it did not discontinue until 1972. The manager trainee ads appeared in the male column and the cashier, counter girl, saleslady, sales clerk ads appeared in the female column.[27]

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[26] It shall be an unlawful employment practice of an employer, ..., to print or publish or cause to be printed or published any notice or advertisement relating to employment by such employer ... indicating any preference, limitation, specification, or discrimination, based on race, color, religion, sex, or national origin, except that such a notice or advertisement may indicate a preference, limitation, specification, or discrimination based on religion, sex, or national origin when religion, sex, or national origin is a bona fide occupational qualification for employment.

[27] A sample of ads appearing in each column on July 11, 1965 read as follows:

MANAGER TRAINEE

20 to 35 with high school education or equivalent to train for store management in expanding chain. Local references.

$82.50 week

Rapid Advancement. Usual large company benefits include retirement plan.

Mr. Olsen
KATZ & BESTHOFF
900 Camp St.

The Morning Advocate had columns designated "Male Help Wanted", "Female Help Wanted" and "Help Wanted". The manager trainee ads appeared in the male column and the pharmacist ads appeared in the neutral "Help Wanted" column.

Genevieve Ronquette testified that she composed the ads for the Times-Picayune until her retirement in 1969, gave the order for the ads by telephone and designated the column in which they would appear. She had no instructions as to the column in which the ads should be placed, and she had a very simple method for making her placement decision,—she designated the column according to her experience as to whether males or females could be expected to apply. Females, not males, applied for cashier, counter and sales jobs; males, not females, applied for management jobs. In other words, the ads were placed to attract applicants and she placed them where she considered they would get the best results.

Ronquette's method of column designation was expressly approved by the EEOC in a guideline issued on April 22, 1966 to employers in the area of "Job Opportunities Advertising", and which remained in effect through January 24, 1969;

Advertisers covered by the Civil Rights Act of

(Footnote 27 continued)

COUNTER GIRL

Soda Department
Permanent Positions
Open in your neighborhood
$48 Week Plus Tips

KATZ & BESTHOFF
900 Camp St.

> 1964 may place advertisements for jobs open to both sexes in columns classified by the publishers under "male" or "female" headings to indicate that some occupations are considered more attractive to persons of one sex than the other. In such cases, the Commission will consider only the advertising of the covered employer and not the headings used by publishers.

All of the ads she placed in the Times-Picayune for the manager trainee position after July 1, 1965 and before her retirement were neutral in their wording. No sex preference was indicated.[28]

All job applicants were interviewed first by Genevieve Ronquette. She held only a preliminary interview with the applicants for manager jobs and sent them to the personnel director Mr. Fred Olsen for further interview. She had no instructions that hires for any one job would be limited to those of a particular sex. In her 20 years in personnel management at K&B she testified that she never knew of anything that she did to discriminate against women.

The ad for personnel director that appeared in the Times-Picayune on January 10, 1971 was not neutral in its wording.[29] It was composed and placed with the news-

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[28] An ad with neutral wording placed in a female column was found not to be a violation by the EEOC itself in its agency decision on May 18, 1969 in case number 68-10-479E.

[29] PERSONNEL DIRECTOR

Charge of complete Personnel Department and program
K&B
Exceptional opportunity to join leading local group of retail stores now expanding. We are seeking a vital aggressive man who is ready to realize his potential.

paper by Walter Feltman, and he readily admitted that the wording indicating a preference for a male was wrong, and it was his mistake. He would have hired a qualified female, according to his testimony.

K&B admits that its series of ads in connection with the opening of three new stores in Baton Rouge in the summer of 1968 contain language indicating a preference for "young men" as manager trainees. To lessen the impact of these ads as indicating any company policy, it introduced a copy of an ad appearing in the same Baton Rouge newspaper a few months later on January 26, 1969 in a neutral advertising column with neutral wording, and similar ads which appeared on February 8, 1970, June 1, 1970, March 21, 1971 and October 29, 1973. It also directs the court's attention to the testimony of John Irwin, an assistant manager of a store in New Orleans in 1968, relating to his efforts in that year to encourage a female employee to apply for a manager trainee position.

The evidence as a whole on the advertising issue causes the K&B ads selected by the EEOC to be less than persuasive as reflecting a policy of excluding females from the manager trainee program, and limiting the manager trainee positions to males. The manager trainee ads were all neutral in language except for the one series of three identical ads which appeared in the Morning Advocate in

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(Footnote 29 continued)

Salary open, unexcelled company benefits.
Requirement: college graduate; age, 30 or above; experienced in field.
Send complete resume in confidence to:
Mr. W. Feltman, in care of
KATZ AND BESTHOFF

900 Camp Street
New Orleans, La. 70130

August and September 1968.[30] Although the nonneutral language of some of the other ads was not acceptable under the EEOC guideline in effect at the time, the majority of all the ads were composed by Genevieve Ronquette, who impressed the court as a truthful witness, and her testimony is clear that her practices in composing and placing ads were not to carry out any policy of discrimination against women, but to achieve the best results from the ads in the light of her experience as to the gender which would be more interested in the job vacancy being advertised.

The Record Keeping of K&B

Finally the EEOC urges that the impossible hurdle to its production of evidence in this case created by K&B's violation of the record keeping provisions of the Civil Rights Act of 1964 in failing to preserve the job application records for the manager trainee position should be removed by the court's drawing an inference of discrimination against the wrongdoer K&B. By this argument the EEOC is in effect urging that any weakness in its evidence as to discrimination in the employment of manager trainees should be overcome by the court's drawing an inference of discrimination from the alleged record keeping violation.

The basis for the inference urged is the equitable principle "omnia praesuntur contra spoliatorem"—all things are presumed against the wrongdoer—which has been applied when record keeping violations occurred in cases under the Fair Labor Standards Act. The EEOC contends that this equitable principle should be applied in this

[30] Comprehensive guidelines indicating that placement of ads in columns headed by the designation "male" or "female" would be considered an expression of preference based on sex was adopted by the EEOC on April 5, 1972.

Title VII case, citing *Hodgson v. Corning Glass Works*, 330 F.Supp. 46 (D.C.N.Y. 1971); *Mitchell v. Williams*, 420 F.2d 67 (8th Cir. 1969); *Schultz v. Wheaton Glass Co.*, 421 F.2d 259 (3rd Cir. 1970); *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 66 S.Ct. 1187, 90 L.Ed.2d 1515 (1946) to draw the inference urged.

Under Title VII, Section 709, 42 U.S.C. § 2003-8(c), employers are required to keep certain employment records:

> Every employer ... shall (1) make and keep such records relevant to the determinations of whether unlawful employment practices have been or are being committed, (2) preserve such records for such periods [period of investigation of an employment discrimination charge] ...

The appropriate regulation promulgated by the EEOC is published in 29 C.F.R. 1602.14:

> (a) Any personnel or employment record made or kept by an employer (including but not necessarily limited to application forms submitted by applicants and other records having to do with hiring, promotion, demotion, transfer, lay-off or termination, rates of pay or other terms of compensation and selection for training or apprenticeship) shall be preserved by the employer for a period of 6 months from the date of the making of the record or the personnel action involved whichever occurs later. *** Where a charge of discrimination has been filed, or an action brought by the Commission or the Attorney General, against an employer under Title VII, the respondent employer shall preserve all personnel records relevant to the charge or action until final

> disposition of the charge or action. The term "personal records relevant to the charge", for example, would include personnel or employment records relating to the aggrieved person and to all other employees holding positions similar to that held or sought by the aggrieved person and application forms or test papers completed by an unsuccessful applicant and by all other candidates for the same position as that for which the aggrieved person applied and was rejected.

The EEOC's argument as to which record keeping requirements were violated and how they were violated is very general and lacking in specificity. K&B denies that it violated the record keeping requirements and directs its argument to what appears to be the only possible requirement which could be urged against it—the preservation of all personnel records relevant to a charge of discrimination until final disposition of the charge.

The allegations in the Capaci original charge filed with the EEOC in January 1973 and in her subsequent charges related to discrimination for failure to promote on the basis of sex, disparate terms and conditions of employment and reprisal and retaliation on the basis of sex. The complaint of Capaci filed in this court on October 8, 1974, as elaborated in her memorandum in support of the class action, was directed to the promotion practices of K&B.

No issue regarding discrimination by K&B in initial employment on the basis of gender was raised in the charge or in this case before the EEOC moved for permissive intervention on January 4, 1977. That motion and the supporting brief contained language broader than the original charge and the complaint. For example, in paragraph four of the motion, it is alleged that "The Commission's

participation ... in this proceeding will promote the public policy of eliminating and preventing discriminatory employment practices based on race," and at page two of its memorandum "... the Commission will be able to aid the Court ... in formulating a remedy which will eliminate the discriminatory employment practices and provide adequate relief for the victims of unlawful discrimination."

K&B preserved, and produced upon the request of the EEOC, applications for the manager trainee position dated from July 1976 for unsuccessful applicants, and the applications of all successful applicants which were contained in their personnel files. The EEOC has been aware since December 1978, when its motion to compel answers to certain interrogatories was heard, of K&B's position that it was not required under the Act to preserve any earlier applications for employment because the treatment of applicants for employment and their applications were not relevant to this charge which focused on K&B's promotion practices. Yet it makes no response to K&B's position and makes no argument to show the relevance of employment applications to the initial charge and the complaint in this case. Under the circumstances of the posture of this case before the intervention of the EEOC, K&B cannot be regarded as having violated the record keeping requirements of the Act.

CONCLUSION

I conclude that the EEOC has not proved by a preponderance of the evidence its claim that K&B had a policy of excluding females from management positions.

The EEOC has presented a less than impressive statistical case. The relevance of the 1970 Census data used

by Dr. Gastwirth has been so weakened by the challenge of K&B that the reliability of his statistical studies of the manager trainee position is in serious doubt. As the defense unfolded, it became obvious that the EEOC needed applicant flow data to make a strong statistical case as to the manager trainee job. Dr. Gastwirth probably made the best use of the data which was available, but he was not able effectively to sustain its relevance to the job under study.

The pharmacy statistical case is weak also, mainly because Dr. Gastwirth structured some of his studies of the period 1965-1973 to eliminate inclusion of the female pharmacists who were promoted during that time. He was not able to explain how those studies were meaningful for the issue before the court.

The nonstatistical evidence of the EEOC adds little weight to its statistical case. The nonstatistical evidence produced by K&B shows that for many years before the passage of the Civil Rights Act, K&B had no policy or practice of exclusion of females from management positions. The males and females got to management by different routes, however. Male pharmacists became managers; female salespersons became managers.

Shortly after the Civil Rights Act became effective, the expansion program of K&B produced changes in the management promotion procedure for both males and females. The planning to increase the volume of retail merchandise over the volume of pharmacy business caused the practice of promoting pharmacists into store-wide management positions to be reduced. The route to these positions was through a manager trainee program for nonpharmacists. The pharmacy needed a pharmacist as manager, however, and the position of chief pharmacist was created

in 1967 to which two females were promoted shortly thereafter.

The practice of promoting female salespersons directly to assistant manager ceased at about the time the Civil Rights Act became effective, and females were slow to enter the manager trainee program. As a result no female was promoted to a store-wide management position for almost nine years. The females who were promoted in that nine-year period were promoted to the positions of employment manager, cosmetic supervisor and chief pharmacist.

The inferences sought by the illegal advertising allegations and the record keeping violation allegations cannot be made to bolster the case of the EEOC.

THE ANDRA CAPACI CASE

Andra Capaci claims that she was discriminated against by K&B on the basis of her sex in the following ways:

1. She was denied promotion to a management position;

2. She was subjected to sexual harassment;

3. She was
   (a) harassed
   (b) terminated
in retaliation for the filing of her sex discrimination charges.

The Promotion Claim

Capaci has established a prima facie case of

discrimination in K&B's failure to promote her to a management position under *McDonnell Douglas Corporation v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). She has shown (1) that she is a member of a protected class; (2) that she applied for, and as a competent pharmacist, was qualified for promotion to a management job that K&B was seeking to fill; (3) that she was not promoted; and (4) that the management position was subsequently filled by a person not a member of the protected class.[31]

Pharmacists were promoted into management positions at K&B, but no formal or written notice of available management positions was given to the employees, and no formal or written application procedure was provided for before the time Capaci filed her charge. When a management position needed to be filled, the executives looked around for the best possible prospect among the personnel, and often called that person to offer the job. Capaci asked Feltman to consider her for promotion to a chief pharmacist as early as 1969 when a new K&B store was opening at the time. Paul Laneuse, a male pharmacist with five years less experience than Capaci, was promoted to the position. Her ambition to be promoted into management was known by Sidney Besthoff, III, William Serda and her supervisor for several years, James LeBlanc, but males

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[31] In *McDonnell Douglas*, a racial discrimination case, the Supreme Court indicated that a plaintiff could establish a prima facie case under Title VII by showing: (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications. At the same time the Court recognized that the formula would have to be modified to fit varying fact situations presented by other Title VII cases.

continued to be promoted into management and she was passed over.

The burden shifts to the defendant K&B under *McDonnell Douglas Corporation v. Green, supra,* as clarified in *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981), to rebut the presumption of discrimination raised by plaintiff Capaci's prima facie case by producing evidence that Capaci was rejected for promotion, or someone else was preferred, for a legitimate, nondiscriminatory reason.[32] Should K&B carry this burden, Capaci then has the opportunity to prove by a preponderance of the evidence that the legitimate reason offered by K&B was not its true reason, but was a pretext for discrimination. Capaci has the ultimate burden of persuading the court that she was the victim of intentional discrimination.

K&B has undertaken the heavy burden of producing evidence that Capaci did not meet subjective standards for promotion to a management position. It admits that she could fill prescriptions accurately, and that she was knowledgeable and conscientious about detecting forged prescriptions. Its contention is based on her alleged lack of concentration and lack of organization in her duties as a pharmacist, resulting from specific work habits which interfered with the efficient processing of prescriptions and the smooth operation of the prescription department.

Her superiors specific complaints against her for the

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[32] The view of the Fifth Circuit in *Burdine* that a defendant has the burden of proving by a preponderance of the evidence the existence of a nondiscriminatory reason was rejected by the Supreme Court, and that burden is "to articulate some legitimate, nondiscriminatory reason" for its action.

10-year period before she was terminated—1965 to 1975—were tardiness, excessive time on the telephone, too frequent and prolonged absences from the prescription department for talks with customers, visits to the cosmetic department to assist customers,[33] attention to personal matters and application of makeup while on duty.

Andrew J. Russo, the male pharmacist manager at Store No. 25 where Capaci served for five years from 1965 to 1970, aptly termed these habits separately as "small faults", but they became serious to him because the time consumed by them would cause an accumulation of prescriptions and create the frustrating situation of his having to assist to get rid of the backlog.

He reprimanded and counseled her repeatedly about her tardiness, which was aggravated by her having to put on makeup before she commenced work, and about the excessive time she spent on the phone with personal calls, and by allowing business calls to last too long. She would heed his reprimands and counseling about her responsibility as a professional and would improve for awhile, but then go back to her same "small faults."

James LeBlanc, the supervisor for Store No. 25,[34] was aware of the problems Russo was having with Capaci. In his opinion her frequent tardiness was the biggest

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[33] Capaci apparently enjoyed assisting in the cosmetic department and would do so voluntarily, absenting herself from the pharmacy department. She revealed her interest to Feltman when the position of cosmetic supervisor was created—in 1967 as he recalled—by requesting that job. He responded by telling her that the low salary in comparison to what she was making as a pharmacist made it unattractive for her. Capaci denies that she ever made such a request of Feltman.

[34] A store supervisor is responsible for the efficient management and smooth operation of a group of stores.

problem, and her receiving personal phone calls was a minor thing. His concern was about the length of time she took for the calls—business or personal. In his words she "did not have the knack of speaking to a customer and helping a customer and then moving on to something else or gracefully hanging up and getting to the job at hand." When his warnings about her tardiness did not correct the problem, he made an appointment in 1968 for him and Capaci to meet with Feltman for the purpose of terminating her.

After he gave account to Feltman of his complaints, Capaci started crying and could not regain her composure for some time. The meeting with Feltman was terminated by LeBlanc taking the still crying Capaci into his office where, after finally regaining her composure, she promised to discontinue her habits which were the source of his complaints. Feltman decided that she should have another chance, much to LeBlanc's dismay, and she was allowed to remain at Store No. 25. She improved for a time and then the pattern continued—slide back into old habits, reprimand, improvement, slide back into old habits, etc.

Russo finally gave up in his efforts to improve her performance by counseling—"straighten her out", in his terms—and in 1970 he requested that she be transferred from his store. Her sense of responsibility was too poor in his opinion to warrant promotion to chief pharmacist.

Capaci was transferred to Store No. 33, a larger store with a busier prescription department than Store No. 25. Her tardiness was a problem to George Neyrey the male pharmacist manager only when she was the only pharmacist on a shift, but the excessive time she spent on the telephone was a continuing problem. She was not able to

keep up with the prescriptions, and, lacking the patience Andrew Russo had exhibited for five years, Neyrey had her transferred out of his store in six months.

She was transferred to Store No. 13, where a male nonpharmacist, Donald Mortenson, was the manager and the pharmacy department was managed by a chief pharmacist Paul Laneuse. It was a new store that had not built up a large prescription business. Nevertheless, her "small faults" continued here and created the same problem. Mortenson repeatedly counseled her about her tardiness, her abuse of the telephone, and her absences from the prescription department to no avail. He found her to be an employee not amenable to his management.

Paul Laneuse had a good relationship with her and he dated her on several occasions. His counseling of her about her repeated tardiness, which created a problem when she was the only pharmacist on duty, had no lasting effect on her. He and Mortenson made their complaints about her work known to James LeBlanc. With some reluctance, stemming from the unexpected failure of Feltman to follow his recommendation on the previous occasion, LeBlanc submitted the complaints again to Feltman for review and a meeting with Capaci was set up.

By this time Feltman had come around to the view that Capaci was never going to keep her promises to change her habits and that they posed a serious enough problem to terminate her. A pharmacist's termination had to be approved by Besthoff, III, however, and the causes for termination were gross dishonesty and irregular or unethical handling of drugs. When the complaints were presented to Besthoff by Feltman, his decision was to transfer her and give her another chance. She was transferred

after 13 months at Store No. 13 to Store No. 20.

Capaci lasted only 5 months at Store No. 20. She failed to improve her work habits, and the chief pharmacist Robert Rugan, on an occasion when he was acting manager, "blew up" when she left the pharmacy department unattended too long for a trip to the dressing room, grabbed her purse from her and attempted to fire her, although he lacked that authority. James LeBlanc went to the store when called by Capaci who complained that Rugan had assaulted and molested her.

LeBlanc determined that Rugan had a justifiable complaint and tried once more to have her terminated in a meeting with Feltman. Feltman was in agreement with LeBlanc, but Besthoff again vetoed the termination, deciding once more that she should be transferred again and given another chance. She was transferred to Store No. 10, which was under the jurisdiction of store supervisor Sydney Levet. LeBlanc had made it known that he would not have her in another store that he supervised.

Thomas Gereighty, the male nonpharmacist manager at Store No. 10 described his experience with her as "terrible". The demands were greatest on a pharmacist on the morning shift and Capaci's performance was so poor that he scheduled her for the less demanding middle and evening shifts. She performed poorly even on these shifts, and her habit of tardiness annoyed Gereighty so much that he warned her he would not tolerate it and considered it a ground for dismissal. In July 1972, some two months after she was assigned to Store No. 10, he sent a disciplinary report based on her tardiness to the office. She refused to sign it.

Shortly thereafter she made known to William Serda, the Personnel Manager, that she wanted a transfer from Store No. 10 because of her schedule and other problems, and that she wanted to talk to Besthoff. She also sent a telegram directly to Besthoff, III, requesting a meeting with him and his father.

Besthoff met with her on August 5, 1972 and she asked to be promoted to store supervisor. He considered with her the possibility of promotion to chief pharmacist, gave no consideration to the supervisor request, but gave her no promotion. Instead she was transferred to Store No. 26 on September 15, 1972.

Ira Levy, the male pharmacist manager at Store No. 26, worked along with her in the pharmacy department, and her poor work habits continued at that store, but he asked for her to be transferred after three months because her incompatibility with other personnel was causing dissension in the store. This prompted another meeting attended by Capaci, Besthoff, Feltman and Levet on January 5, 1973. By this time Besthoff was aware that Feltman, Serda, LeBlanc and Levet were uniform in their opinion that her employment should be terminated.[35] He had expressed himself to Feltman as wanting to do everything possible to reduce turnover in the company, especially in the professional staff and management. He was ever hopeful that the problems of any employee could be overcome by talking to the individual. Once more he refused to go along with the recommendation of termination.

Capaci was transferred to Store No. 24 and Feltman

[35] Serda evaluated her in his deposition as unstable and immature. Capaci realized by this time that Feltman and Levet wanted her terminated.

told her that this was her last transfer—if she did not make it there, she would be terminated. She filed her first charge of discrimination on January 11, 1973 and commenced her assignment at Store No. 24 on January 15, 1973.

K&B's evidence has demonstrated that, despite Capaci's ability to fill prescriptions accurately, she was a poor employee, and was such a problem in every store that she worked after 1965 that the managers requested that she be transferred. In rebuttal Capaci contends that K&B's reasons are pretextual because the male pharmacists and managers were also tardy and used the telephone for personal calls, and they were nevertheless promoted.[36]

Capaci's faults were "little faults" that the males at K&B were admittedly guilty of also, but she overdid them to the point that they were magnified into a problem in the smooth operation of a store, and she compounded the magnification by being unwilling or unable to overcome them. Her poor performance record was sufficient to prevent her from being qualified for a management position. An employer cannot be expected to consider such an unsatisfactory employee as qualified for promotion.

Anthony Russo impressed the court with his sincerity in having tried to help Capaci overcome her deficits as an employee, and he gave up after five years with the realization that he had accomplished nothing. She never changed

[36] She contends also that her gender was the real reason for her not being promoted because Feltman told her in 1969 when she asked him for promotion to chief pharmacist that K&B did not promote women into management. It is difficult to understand how Feltman could have made that remark to her in light of the fact that K&B had promoted two females to the chief pharmacist position a short time previously, and how she would have taken him seriously if he had made such a remark.

her poor work habits and no manager thereafter had patience with her shortcomings. All of the managers were believable in their frustration at not being able to manager her.

K&B, therefore, has articulated a legitimate, nondiscriminatory reason for failing to promote Capaci. Capaci has failed to show that its reason was pretextual, and thus has failed to discharge her burden of proof to show that K&B discriminated against her on the basis of her gender in failing to promote her to a management position.

The Sexual Harassment Claim

Capaci testified to several unsupported allegations of encounters with sexual overtones with male employees which were never brought to the attention of their superiors in management. She charges also that Donald Mortenson, manager of Store No. 13, put his hands on her breasts on an occasion when they were near the time clock at closing time. She did not report the incident when it occurred, but reported it later on to LeBlanc the store supervisor.

LeBlanc confronted Mortenson with her accusation, and Mortenson denied that the incident described had occurred. His version to LeBlanc was that she was standing in front of the time clock reading her card and he reached past her to punch the clock, but he did not touch her. LeBlanc did not believe that Capaci was lying, but he knew nothing in the past of Mortenson that would cause him to believe that Mortenson would engage in such unacceptable conduct with an employee. He never could be sure of the truth of the matter, but he concluded that something did happen—Mortenson perhaps did touch her—but he could

not conclude it to be as serious a touching as represented by Capaci.

He spoke seriously to Mortenson about the matter, telling him that the company would not tolerate such conduct, and indicating to him strongly that such conduct would place his job in jeopardy. Capaci was not satisfied that he did not accept her version completely and fire Mortenson, or have him reprimanded from the executive office.

Capaci alleges that K&B was aware of other incidents of management employees sexually molesting female employees. Louise Orgeron testified that at some time she was molested by a relief manager Bobby Graham. She did not report the incident, but Larry Farmer testified that he reported it to William Serda. Feltman was never notified of this incident, but when Graham was reported in another incident for making sexually suggestive remarks, Feltman talked him into resigning. Feltman fired another manager in Baton Rouge for such behavior.

Thomas Gereighty admitted on cross-examination that he was reported to Feltman for having grabbed a female employee, but there is no evidence that the report was not investigated. The female involved did not testify.

Capaci has not shown that K&B failed to investigate her complaint of improper sexual advances or that it took inappropriate action. Her evidence is wholly inadequate to show that K&B had a policy or condition of employment permitting or condoning untoward sexual behavior against female employees. The sexual harassment claim must therefore be denied.

The Harassment and Retaliation Claims

Capaci calims that after filing charges with the EEOC, she was harassed by (1) the intentional building of her personnel file; (2) acts of her supervisors resulting from their being encouraged to harass her; (3) denial of a routine wage increase that was granted to most employees; (4) discharge from her employment.

(1) The Building of the Personnel File

The evidence shows that Capaci's personnel file contains more documentation of disciplinary matters after 1970 than before that time for two reasons. Before 1970 and the expansion of the K&B operation disciplinary matters were handled person-to-person with no documentation. Incident reports were made of matters mostly involving customers which might involve company liability. After 1970 disciplinary matters were documented in disciplinary reports. By June or July 1973 Feltman had instructed the store supervisors and the manager at Store No. 24, to which Capaci was assigned, to document all things out of the ordinary or unusual in Capaci's performance. He testified that he did this not to harass her but to correct the error K&B had made in not having her performance documented previous to her charge.

Feltman's avowed purpose was to have documented anything that occurred of importance relating to the EEOC investigation of Capaci's charges. The result of his instructions, however, was the building of a file which included reports of trivial, petty, insignificant events involving Capaci, which would never have appeared in the file of another employee. These could serve no purpose other than to impart to Capaci a sense of harassment. K&B attempts

to lessen the importance of the large file built on Capaci by pointing out Feltman's admission that he gave the petty matters no weight. The weight which he gave them, however, does not lessen their impact as harassment to Capaci.

(2) The Acts of the Supervisors

The accusations of harassing acts are directed mainly at James McAllister, the nonpharmacist manager of Store No. 24, and Tim Rosenstein, the chief pharmacist at that store. Capaci contends that she was consistently and routinely locked out of the store so as to cause her to be late. A manager trainee for a few months at Store No. 24, Larry Farmer, testified that McAllister instructed him not to unlock the door for Capaci before the store opened at 8:00 A.M. McAllister denied that he told anyone to lock her out. Farmer did not make clear how often Capaci was locked out, and the claim that it was routine is not established.

McAlister and Rosenstein allegedly screamed at her and embarrassed her in front of customers and other employees. She admitted that Rosemstein's attitude and treatment of her could have been caused by her termination of a dating relationship, which took place before they were employed at Store No. 24, when Rosenstein asked her to have an intimate relationship with him. That McAllister made complaints to her in louder than a normal voice is confirmed by Dan Barrere, an assistant manager at the store. His tone could have been due to frustration, rather than an effort to harass her. According to her, she ignored him—would listen to what he had to complain about and just walk away.

Capaci further complains that they regularly made

distressing, even threatening comments to her. What she took seriously to be threats were two incidents. On one occasion when she was going up the stairs Rosenstein told her she was going to accidentally trip, and on another Rosenstein and McAllister were allegedly discussing ways to kill her within her hearing.

Capaci testified that she had no cause to accuse K&B of being responsible for trouble she had with her automobile, but she suspected them. She testified that she had 18 flat tires in the month after she filed this suit, her valve stems were cut and wires in her car were pulled loose. She could produce bills for only tow of the incidents. She explained that she had given all of the bills to a previous attorney, and he must have thrown all of them away except those around the store. One of these was for a blowout which happened at a place away from the store, and the other was for a valve stem. She testified that some of the trouble occurred at her apartment.

Rosenstein was aware of her tire trouble. According to him she had bad tires and her wheels were not aligned. Feltman was made aware of the trouble she was having with her tires, but he did not investigate it because it was occurring on the street. Capaci testified that she parked on the streets around the store, and not in the K&B parking lot.

The evidence on the harassment complaints against Capaci's supervisors is not sufficient to establish a pattern for the court to infer that they resulted from Feltman's encouraging K&B's supervisory personnel to harass her. Capaci's testimony made clear that she considered any complaint of her work a harassment, and that she suspected that the harassment was done on orders from

Feltman. She had no more than her suspicion, however, to substantiate such a charge against him. Nor were the alleged acts of harassment of such an intensity that Feltman was aware or should have been aware of them as harassment.

The evidence as to the tire and other automobile trouble is not sufficient to place responsibility on K&B for it, or responsibility for investigating it.

(3) The Wage Increase

Capaci charges that the denial of a wage increase to her in August 1973 was in retaliation for her filing the charge with EEOC. K&B points out that this was not a routine wage increase, but a merit increase which she was denied on account of her unsatisfactory job performance. Capaci characterizes the fact that nineteen other pharmacists were passed over for this raise as a "coverup" for K&B's retaliation. The circumstances do not show the denial of the wage increase was an act of retaliation.

(4) The Discharge of Capaci

Capaci was discharged for her handling of a prescription customer in what is referred to as the Lambremont incident. Capaci presents the incident and her subsequent discharge as treatment accorded a highly regarded pharmacist of 12 years standing—a competent, conscientious, dedicated employee, and urges that her discharge for this incident can be regarded only as retaliation for filing her EEOC charge. K&B views the incident in the light of her past problems in work performance as the "last straw."

The incident occurred on Friday eveing, March 14,

1975. Capaci 's schedule was from 1:30 in the afternoon until 10:00 p.m. Her co-pharmacist Carroll Culley, who was on the middle shift, 10:00 a.m. to 6:30 p.m., checked out at 6:43 p.m. Capaci was the sole pharmacist on duty after that time. JoAnn Lambremont gave the drug clerk Verna Vicknair a prescription for her sister Libby Lambremont, and it was stamped in at 6:36 p.m.

According to Capaci, Culley had hardly got to the front of the store when she noticed a woman in line at the prescription counter folding her arms, stamping her feet and complaining to the other customers in line. She picked up the waiting envelopes and called out names until she reached Lambremont. She then called Lambremont to come forward and Lambremont stepped up into the pharmacy department.

Capaci contends that Lambremont could not have been waiting more than seven minutes, based on the time that Culley checked out. Lambremont testified that she had been in the line 40 minutes—long enough for her sister to go through a long line at the bank across the street and come into the drug store. Libby Lambremont testified that she was at the bank for 25 or 30 minutes and in K&B five or ten minutes before her sister was called by Capaci. Another customer Mrs. Langdon H. Stone, Jr., whose prescription was stamped in at 6:31 p.m., wrote a complaining letter to K&B the next day about her 50-minute wait for her prescription, during which only one other prescription was filled.

The truth of the matter is probably that Lambremont was in line somewhat less than 40 minutes, but considerably more than seven minutes before the incident.

Capaci testified that she approached Lambremont with an attitude of concern and helpfulness.[37] She told Lambremont that, if she were in pain, she would give her a pill from her prescription, and she could go the fountain and wait. The prescription was for the drug Valium, but Capaci denied that she had looked at the prescription to know what it was for. Then, according to Capaci, Lambremont became hysterical and screamed that she was not Libby Lambremont, was not in pain and did not want a pill. She demanded "Are you telling me that I need a tranquilizer?", grabbed the prescription and complained to the other customers and the assistant manager in charge of the store, Nicholas Loyacano, about Capaci's treatment of her.

JoAnn Lambremont, a medical secretary at the Seafarer's medical clinic for 10 years, testified that she construed Capaci's attitude as being bossy with her. Capaci told her she was antagonizing the other customers, and that, if she was so nervous, she would give her a pill. She was embarrassed, furious and insulted by Capaci's calling her forward and speaking to her thus. She agreed that she might have snatched the prescription out of Capaci's hand.

No one overheard their conversation. Judging by Lambremont's furious reaction, Capaci did not get across to her any attitude of concern or helpfulness. Capaci's testimony is clear that she was irritated by Lambremont's antagonistic behavior in line, and, regardless of whether she offered her a pill for pain or nervousness, she more than likely expressed her irritation to Lambremont.

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[37] Capaci also testified that, from the moment she saw Lambremont's behavior in line, she suspected a "set up" as part of a plan to fire her, but she was not able to substantiate this suspicion.

When Lambremont complained to the assistant manager, he apologized for the discourteous service. Her anger continued, however, and after going home, she called Capaci on the telephone, and told her how unethical and unprofessional it was to offer her a pill out of a prescription that was not hers.

The assistant manager Loyacano testified that his attention was on some suspected shoplifters before the incident, but that, while standing in the pharmacy area, he observed Capaci talking on the telephone for a time he estimated to be 20 minutes. Vicknair confirmed that no prescriptions came out while Lambremont was waiting. Lambremont testified that Capaci was talking to somebody, or primping her hair, or looking in a mirror, but she was not doing anything to get the prescriptions out. Capaci recalled that she was very busy with a compound prescription that she could not fill because she lacked one of the ingredients, and with a welfare prescription for a child which presented the problem of identifying the child with the name on the prescription.

The following week Feltman investigated the incident by having JoAnn Lambremont come to his office, and by interviewing Loyacano, Culley, Vicknair and Crispino, a drug clerk who was on a break at the time of the incident. As a result he determined that Capaci should be terminated. He discussed the matter with counsel, put it before Besthoff who agreed with his recommendation to terminate her, and Capaci was discharged on March 22, 1975.

Feltman discharged Capaci for three reasons:

1. She took an inordinate amount of time getting

prescriptions filled that evening, creating customer dissatisfaction;

2. She invited a customer into the prescription department against company policy; and

3. She offered medication to a waiting customer who was not the person for whom the medication was intended.

After Culley left, the evidence is clear that Capaci was slow in getting prescriptions out. She exercised bad judgment in handling Lambremont in a way to offend her.

Allowing a customer into the prescription department was against company policy designed to keep customers away from the area where narcotics and dangerous drugs were kept. Besthoff testified that a pharmacist had some discretion to allow a customer into the department under exceptional circumstances. The evidence does not indicate that any exceptional circumstances were present in the Lambremont incident.

Offering medication to a waiting customer was considered appropriate on occasion. Offering medication to a person for whom it was not prescribed was a pharmaceutical error, but the error is less grievous under the circumstance of JoAnn Lambremont bringing her sister's prescription to be filled. The offer was not made by Capaci knowingly, and the real mistake was her failure to ascertain that JoAnn Lambremont was waiting for her own prescription before making such an offer.

Capaci argues that Feltman's reasons were pretextual. Feltman's reasons were not the usual reasons that would prompt the discharge of a pharmacist at K&B—

gross dishonesty or irregular handling of narcotics. If Capaci had been a highly regarded employee as she characterizes herself, the action taken against her for this incident would undoubtedly have been less than termination. No such high regard was held for her as an employee, however. On the contrary, Feltman, the store supervisors LeBlanc and Levet, and Serda the personnel director were in accord that she should be terminated before her charge was filed. The filing of her charge had no relevance to their evaluation of her as an employee. Capaci urges that it is highly significant that Feltman did not ask her for her version of the incident before deciding to discharge her. Feltman testified that his experience with Capaci convinced him that discussions with her were futile.

Capaci was not terminated for some 26 months after the charge. Feltman described her attitude after she filed her charge as having placed herself in a protective cocoon. She refused after a time to sign any disciplinary reports or give her version of the incidents on advice of counsel. Her problems in performance were never worked out. As her chief pharmacist Tim Rosenstein described her, she could be an efficient pharmacist when she wanted to be and, when she did not want to be, there was nothing management could do about it. The Lambremont incident was apparently serious enough to Besthoff to cause him to agree with Feltman that the problems presented by Capaci's performance were not going to be straightened out.

Under all the circumstances, Capaci has not shown that her discharge was a retaliatory action.

CONCLUSION

I conclude that Andra Capaci has not proved by a

preponderance of the evidence her claim that she was denied promotion to a management position on the basis of her sex, or that she was subjected to sexual harassment, or that she was discharged in retaliation for the filing of her sex discrimination charges. She has proved harassment in retaliation for the filing of the charges by K&B's intentional building of her personnel file. Her other retaliatory harassment claims were not proved.

APPENDIX "C"

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 82-3228

D. C. Docket No. CA-74-2743-"E"

ANDRA A. CAPACI,

Plaintiff-Appellant
Cross-Appellee,

versus

KATZ & BESTHOFF, INC.,

Defendant-Appellee
Cross-Appellant,

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,

Intervenor-Appellant.

Appeals from the United States District Court for the Eastern District of Louisiana

Before BROWN, REAVLEY and RANDALL, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed in part and reversed in part; and that these causes be, and the same is hereby remanded to the said District Court in accordance with the opinion of this Court;

IT IS FURTHER ORDERED that plaintiff-appellant/cross-appellee pay one-fourth of the intervenor-appellant's costs on appeals to be taxed by the Clerk of this Court; and defendant-appellee/cross-appellant pay three-fourths of said costs.

AUGUST 9, 1983

Issued as Mandate:

APPENDIX "D"

CORRECTED

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 82-3228

ANDRA A. CAPACI,

Plaintiff-Appellant
Cross-Appellee,

versus

KATZ & BESTHOFF, INC.,

Defendant-Appellee
Cross-Appellant,

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,

Intervenor-Appellant.

Appeals from the United States District Court for the
Eastern District of Louisiana

ON PETITIONS FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

(Opinion August 8, 5 Cir., 1983, __ F.2d __)

(OCTOBER 3, 1983)

Before BROWN, REAVLEY and RANDALL, Circuit Judges.

PER CURIAM:

The Petitions for Rehearing are DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion of Katz & Besthoff, Inc. for Rehearing En Banc is DENIED.

EXHIBIT 1

ADAMSON, Carlina	(46)	KEESING, Brenda	(51)
BONVILLIAN, Rose	(22)	KOBITZ, Mary	(43)
BOUDREAUX, Janie	(20)	LACHAUSSE, Shirlene	(44)
BOYD, Carol	(12)	LAURETT, Bettie	(37)
BREAUX, Marjorie	(48)	LEVET, Ruth	(10)
BRIGHTMAN, Rosalie	(4)	LIUZZA, Josephine	(11)
BRUNSON, Sue Ann Buntain	(27)	McCAULEY, Pat	(23)
BURAS, June W.	(13)	McCLEOD, Billie	(47)
BURK, Theresa	(33)	McNAMARA, Laurie	(35)
CALLIHAN, Blanche	(8)	MILLER, Billie	(31)
CANARD, Vickie	(32)	MILLER, Grace	(6)
CHOATE, Laverne	(26)	MOUTON, Janet	(42)
CHUN, Amelia	(14)	MURRAY, Shirley	(15)
DELAVALLADE, Irene	(3)	NORRIS, Elizabeth	(28)
ELLENDER, Connie	(30)	NUNGESSER, Inez	(5)
FALCON, Ella Mae	(19)	PALMISANO, Margaret	(7)
FEIGEL, Mary	(45)		
FOREST, Bobbie	(21)	REESE, Louise	(9)
FORET, Joyce	(50)		
FRICK, Carolyn	(40)	ROBOTTOM, Anetta	(17)
GLYNN, Angela	(25)	RONQUETTE, Genevieve	(1)
HAIR, Melva	(24)	ROY, Diane	(16)
HENNESSEY, Lillian	(2)	SHAMBURGER, Bobbye	(29)
HOPWOOD, Madeline	(39)	SMITH, Nancy	(49)
INNERARITY, Joyce	(18)	TREST, Susan K.	(38)
JENKINS, Donna	(41)		
JOHNSON, Shelia	(34)		
JORDAN, Donna	(36)		

- K#3 No 110 -

Explanation of abbreviations appears on last page.

	DATE OF ENTRY INTO MGMT	NAME	INITIAL MGMT POSITION	DATE OF INITIAL EMPLOYMENT	INITIAL CLASS	PERTINENT PROGRESSION		PRESENT STATUS
1.	9/47	Genevieve Ronquette	AM	1/34	SLSP.	PERS. DIR. PERS. MGR.	1/50 1/59	RET. 1/69
2.	1/53	Lillian Hennessey	AM	11/39	SLSP.	MGR.	5/54	RET. 1/73
3.	3/54	Irene Delavallade	AM	2/22	SLSP.			RET. 2/66
4.	5/54	Rosalie Brightman	AM	9/47	SLSP.			RES. 1/61
5.	9/60	Inez Hungesser	AM	4/27	SLSP.			RET. 6/69
6.	9/60	Grace Miller	AM	6/49	RX.	RM RX CRX RX CRX	8/61 8/63 7/68 2/69 8/74	RES. 5/78
7.	1/61	Margaret Palmisano	AM	6/49	SLSP.			RET.12/65
8.	3/65	Blanche Callihan	AM	11/48	SLSP.			RET. 7/73
9.	5/65	Louise Reese	AM	7/39	SLSP.	SR. CLK	9/60	DEC'D 8/65
10.	3/68	Ruth Levet	COS. SUPER.	6/61	SLSP.	OFF.CLK RXA SR. CLK	7/60 8/63 9/65	RES.10/70
11.	10/68	Josephine Liuzza	CRX	1/31	SLSP.	RX	1/34	RX 2/75
12.	9/70	Carol Boyd	COS. SUPER.	3/68	SLSP.	SLSP.	9/71	SLSP.
13.	8/71	June W. Buras	COS. SUPER.	1/71	SLSP.			COS.SUPER.
14.	4/73	Amelia Chun	CRX	2/71	RX			RES. 2/75
15.	7/73	Shirley Murray McDuffie	EMPL. MGR.	7/73	EMPL.MGR.			RES. 2/78
16.	10/73	Diane Roy	CRX	5/67	NON.REG.GRAD.	RX	8/67	CRX
17.	10/73	Anetta Robottom	CRX	7/70	RX			CRX

	DATE OF ENTRY INTO MGMT	NAME	INITIAL MGMT POSITION	DATE OF INITIAL EMPLOYMENT	INITIAL CLASS	PERTINENT PROGRESSION	PRESENT STATUS
18.	2/74	Joyce Innerarity	MT	1/73	SLSP.	PHOTO PROCESSER 7/74	RES. 8/74
19.	4/75	Ella Mae Falcon	MT	5/73	SLSP.	RM 3/76	RM
20.	7/75	Janie Boudreaux	MT	8/72	SLSP.	RM 9/75 AM 3/77 MGR. 11/77	MGR.
21.	8/75	Bobbie Forest	MT	8/71	SLSP.	RM 5/76	RM
22.	10/75	Rose Bonvillain	MT	8/74	SLSP.	RM 1/76 SLSP. 8/76 RES. 2/78 SLSP. 9/78 MT. 1/79	MT.
23.	1/76	Pat McCauley	MT	2/71	SLSP.	RM 3/77	TER.10/78
24.	3/76	Melva Hair	ASST. PERS. DIR.	9/71	PERS. CLK	"	RES. 9/78
25.	4/76	Angela Glynn	CRX	7/75	RX		CRX
26.	4/76	Laverne Choate	COS. SUP.	3/69	SLSP.	RES. 8/75 REINST. 3/76	COS.SUP..
27.	7/76	Sue Ann Buntain Brunson	MT	4/74	RXA	RM 3/77 AM 11/77	AM
28.	8/76	Elizabeth Morris	MT	1/74	SLSP.	DECL. FROM '77 RM 7/78	MT
29.	9/76	Bobbye Shamburger	MT	9/76	MT	RM 6/77	RM
30.	10/76	Connie Ellender	MT	10/76	MT	RM 4/77	RM
31.	1/77	Billie Miller	MT	1/75	SLSP.	RM 6/78	RM
32.	2/77	Vickie Canard	MT	11/75	SLSP.	RM 9/78	RM
33.	3/77	Theresa Burk	MT	3/77	MT	RM 8/77	RES.11/77

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	DATE ENTRY INTO MGMT	NAME	INITIAL MGMT POSITION	DATE OF INITIAL EMPLOYMENT	INITIAL CLASS	PERTINENT PROGRESSION		PRESENT STATUS	
34.	6/77	Shelia Johnson	MT	1/77	SLSP.	RM AM	11/77 8/78		
35.	6/77	Laurie McNamara	MT	6/77	MT	RM	9/77	RM	
36.	8/77	Donna Jordan	MT	5/75	SLSP.	RM	8/78	RM	
37.	8/77	Bettie Laurett	CRX	3/76	RX			CRX	
38.	10/77	Susan K. Trest	MT	10/77	MT	RM	1/78	RM	
39.	11/77	Madeline Hopwood	MT	8/76	SLSP.	RM	7/78	RM	
40.	3/78	Carolyn Frick	MT	3/78	MT			RES.	8/78
41.	4/78	Donna Jenkins	MT	1/76	SLSP.	RM	10/78	MT	
42.	4/78	Janet Mouton	MT	11/76	SLSP.			RES.	7/78
43.	5/78	Mary Kobitz	MT	9/76	SLSP.	RM	8/78	RM	
44.	5/78	Shirlene Lachausse	MT	9/76	SLSP.	SLSP.	7/78	SLSP.	
45.	5/78	Mary Feigel	MT	5/78	SLSP.			RES.	6/78
46.	6/78	Carlina Adamson	MT	5/78	SLSP.			MT	
47.	7/78	Billie McCleod	MT	3/77	SLSP.			RES.	12/78
48.	8/78	Marjorie Breaux	MT	6/75	SLSP.			MT	
49.	8/78	Nancy Smith	CRX	6/77	RX			CRX	
50.	11/78	Joyce Foret	MT	9/78	SLSP.			MT	
51.	11/78	Brenda Keesing	MT	10/78	SLSP.	RES. MT	12/78 1/79	MT	

ABBREVIATIONS

AM	=	Assistant Manager
ASST.PERS.DIR.	=	Assistant Personnel Director
COS. SUPER.	=	Cosmetic Supervisor
CRX	=	Chief Pharmacist
DEC'D.	=	Deceased
DECL. PROM.	=	Declined Promotion
EMPL. MGR.	=	Employment Manager
MGR.	=	Manager
MT	=	Manager Trainee
NON.REG.GRAD.	=	Non-registered Graduate
OFF. CLK	=	Office Clerk
PERS. CLK	=	Personnel Clerk
PERS. DIR.	=	Personnel Director
PERS. MGR.	=	Personnel Manager
PHOTO PROCESSOR	=	Photo Processor
REINST.	=	Reinstated
RES.	=	Resigned
RET.	=	Retired
RM	=	Relief Manager
RX	=	Pharmacist
RXA	=	Pharmacy Assistant
SLSP.	=	Salesperson
SR. CLK	=	Senior Clerk
TER.	=	Terminated

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MAR 14 1984
ALEXANDER L. STEVAS,
CLERK

Nos. 83-1091 and 83-1094

In the Supreme Court of the United States

OCTOBER TERM, 1983

ANDRA A. CAPACI, PETITIONER

v.

KATZ & BESTHOFF, INC., AND
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

K & B, INC., PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

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TABLE OF AUTHORITIES

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-1091

ANDRA A. CAPACI, PETITIONER

v.

KATZ & BESTHOFF, INC., AND
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

No. 83-1094

K & B, INC., PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

In No. 83-1094, petitioner K&B, Inc., contends that the court of appeals erred when it ruled that one of the district court's findings of nondiscrimination was clearly erroneous.

1. Andra Capaci filed a charge with the Equal Employment Opportunity Commission in January 1973, claiming that K&B violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, by denying her a promotion to a

managerial position because of her sex. Subsequently, Capaci brought a Title VII action against K&B in the United States District Court for the Eastern District of Louisiana, and the Commission intervened as a plaintiff. Capaci pressed her individual claims; the Commission claimed that K&B systematically excluded women from management positions. Pet. App. A3, A40.[1]

There were two paths to management at K&B: the firm appointed "manager trainees," and it promoted pharmacists to the positions of chief pharmacist or assistant manager (Pet. App. A41). The Commission attempted to show that both selection processes were discriminatory, but the district court rejected both of the Commission's contentions (*id.* at A41-A89). The district court also rejected all of Capaci's various claims except one, an allegation that she was harassed in retaliation for filing the charge with the Commission (*id.* at A89-A109).

The court of appeals affirmed all of the district court's rulings on Capaci's claims (Pet. App. A29-A37) [2] and also upheld the district court's finding that the Commission had not shown that K&B discriminated in promoting pharmacists to managerial positions (*id.* at A14-A15). In addition, the court of appeals upheld the district court's finding that K&B did not discriminate in the selection of manager trainees after Capaci filed her charge with the Commission (see *id.* at A28). But the court of appeals held that the district court was clearly erroneous in ruling that the Commission failed to prove discrimination in the selection of manager

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[1] "Pet. App." refers to the appendix to the petition in No. 83-1094.

[2] In No. 83-1091, Capaci has sought review of this ruling. Capaci's claims present issues distinct from the Commission's. The Commission took no position on her claims at trial or on appeal and takes no position on the questions presented in her petition.

trainees during the period between the effective date of Title VII and the date on which Capaci filed her charge (*id.* at A4-A28).

The court of appeals summarized its reasons for reaching this conclusion as follows (Pet. App. A28):

> [T]here was: (1) an overwhelmingly strong statistical case [suggesting discrimination]; (2) a dearth of meaningful testimony by employees to rebut the numbers; (3) newspaper advertising which, while not determinative in itself, must be viewed as some evidence of discrimination.

The court of appeals stated that "the most important single fact presented to the district court" was that between the effective date of Title VII and the date on which Capaci filed her charge, K&B appointed 267 persons to positions as manager trainees and all 267 were men (Pet. App. A4). The court of appeals noted that the likelihood that this could occur as a result of random selection was infinitesimal, on the order of less than one in a billion. This calculation was based on labor market data, that is, on a comparison with various occupational groups from which manager trainees might be selected — for example, retail managers in the local area earning roughly the same amount as a K&B manager trainee. Pet. App. A4-A6, A45.

The district court, in finding that K&B had not discriminated in the selection of manager trainees, was apparently persuaded by K&B's contention that the Commission's statistics were invalid because the rigors of the job tended to discourage a disproportionate number of women from applying to be manager trainees (see Pet. App. A54-A55). The best way to assess this contention — which was, as the district court acknowledged, based only on the opinions of K&B's expert witness, not on any studies (see *id.* at A50)

— would have been to examine "applicant flow" data revealing the percentage of women applicants. But K&B had not retained its applications for the period in question, except for the year 1976-1977 (see *id.* at A7, A26 n.7). In that year, women were 19.2% of the applicants, a figure comparable to that suggested by the labor market data. The district court recognized, and the court of appeals agreed, that so long as the percentage of women in the applicant pool was greater than 2%, K&B's selection of *no* women would be statistically significant (see *id.* at A9, A55 n.13). For these reasons, and because it also considered K&B's other objections to the Commission's statistical showing and found them unconvincing (see *id.* at A8-A14), the court of appeals concluded that the record did not support the district court's ruling that the Commission's statistical case had been overcome.

The court of appeals noted, in addition, that other evidence buttressed the Commission's statistical case. For example, during the relevant period, K&B had routinely placed classified advertisements for manager trainees in the "Help-Wanted-Male" columns of newspapers (Pet. App. A22). Some advertisements for managerial positions specifically stated that men were sought (see *id.* at A21: "We are seeking a vital, aggressive man who is ready to realize his potential") — unlike the advertisements for such nonmanagerial positions as "counter girls" and "salesladies" (*id.* at A21-A22).

The court of appeals also relied on testimony offered by K&B itself. The court explained (Pet. App. A16): "After reviewing the record with some care, we find that K&B made a sizeable and respectable presentation of testimonial evidence that it did not discriminate against women after the Capaci charge was made. However, what little testimonial evidence was presented concerning practices prior to

the charge does not support the same conclusion." Specifically, K&B officials testified that their principal concern in the years after Title VII was enacted had been with discrimination on the basis of race, not sex, and that Capaci's charge had spurred them to examine more closely their practices concerning the hiring of women to management positions (*id.* at A18-A19).

2. K&B contends that the court of appeals exceeded the scope of review specified by the "clearly erroneous" standard of Fed. R. Civ. P. 52(a). But the court of appeals explicitly recognized that it was "confined to asking whether the district court was clearly erroneous" (Pet. App. A26), and it stated: "This court and this panel take the clearly erroneous standard seriously, particularly in light of recent admonishment by the Supreme Court that we properly defer to district court fact findings in discrimination cases as we would in any other case" (*id.* at A28). Moreover, the court of appeals applied the clearly erroneous standard to uphold the district court's rulings in every respect but one, even though the district court's other findings of nondiscrimination were certainly open to question. For example, women were so severely underrepresented in the group of manager trainees appointed between the time Capaci filed her charge and the end of 1977 that the likelihood of random selection in that period was less than one in 10,000 (*id.* at A6).

K&B's principal assertion is that the court of appeals attached undue significance to the undisputed fact that between the effective date of Title VII and the filing of Capaci's charge, none of the 267 persons who entered the manager trainee program was a woman. But this is, of course, a dramatic disparity that obviously requires some explanation. Contrary to K&B's assertions, the court of appeals did not hold that a defendant in a Title VII action is "doomed * * * to defeat as soon as the zero goes into evidence. No explanation will do" (83-1094 Pet. 7). Instead,

the court of appeals considered K&B's proffered explanations with care (see Pet. App. A8-A14) and found not only that they were insufficient but that nonstatistical evidence strongly supported the inference of discrimination.

By contrast, the district court's discussion of the statistical evidence on this point was superficial and conclusory (see Pet. App. A54-A56). Notably, the district court, unlike the court of appeals, did not distinguish the periods before and after the filing of Capaci's charge, even though there was testimony from K&B officials suggesting that the firm's hiring practices changed at that point.

Indeed, K&B still fails to explain its failure to appoint a single women to a manager trainee position during the relevant period. K&B does not dispute the court of appeals' conclusion that that failure would be statistically significant even if the number of women in the group from which manager trainees were selected had been as low as 2%, and K&B suggests no reason whatever to believe that the number of women available for the positions even approached being that low. In these circumstances there is no reason for this Court to review the court of appeals' determination that one of the district court's several findings was clearly erroneous.

It is therefore respectfully submitted that the petition for a writ of certiorari in No. 83-1094 should be denied. The Commission takes no position on the petition in No. 83-1091.

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